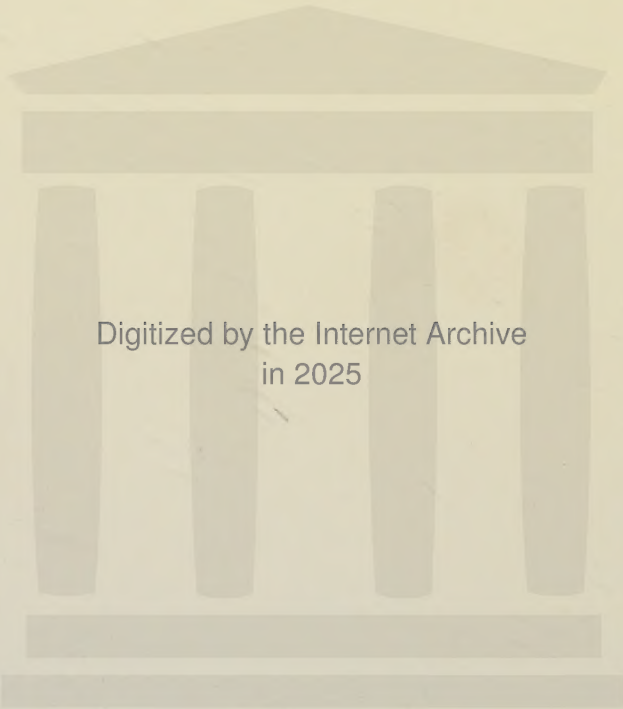




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A
MANUAL
OF
COMMON LAW
FOR
PRACTITIONERS AND STUDENTS,
COMPRISING THE
FUNDAMENTAL PRINCIPLES,
WITH
USEFUL PRACTICAL RULES AND DECISIONS.

BY
JOSIAH W. SMITH, B.C.L., Q.C.,
Author of "A Compendium of the Law of Real and Personal Property,"
"A Manual of Equity," &c.

ELEVENTH EDITION

BY
CUTHBERT SPURLING, M.A., B.C.L. (Oxon.),
OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.



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PREFACE

TO

THE ELEVENTH EDITION.



CONSIDERABLE changes have been made in this Edition. The arrangement of topics has been altered, and the subject of the Common Law dealt with under the two great divisions of Torts and Contracts. Numerous additions to the book have been found necessary, especially in connection with the Law of Torts. The chapter on Sale has been entirely re-written. A chapter on Corporations has been inserted, and the chapter on Evidence enlarged. The changes occasioned by recent statutes and cases have been incorporated in the text. Fresh treatises have been added to the list of text-books upon which the work is based; and a few obsolete works have been omitted. The references have been adapted to recent editions.

The index has been revised and supplemented. Space has been gained for these alterations, partly by the re-arrangement of topics, and partly by cutting down those portions of the former edition which dealt with the subjects of Guardian and Ward, Parent and Child, Divorce, and the old forms of Action.

CUTHBERT SPURLING.

11, NEW COURT, LINCOLN'S INN.

January, 1898.

PREFACE

TO

THE NINTH EDITION.

THIS volume is founded on about seventy text-books, which are referred to in it as often as any use has been made of them, and in other instances where a reference to them seemed desirable. And it was designed as a *Companion to the Author's Manual of Equity*, for many years used for examination by the Council of Legal Education at Lincoln's Inn. . . .

Whether this Manual be used as a first-book or as a second-book, the Student would probably do well to read it as his final text-book. This would tend to revive and fix in his mind some 2,000 leading points of the most constant recurrence in daily practice, as comprised in the following pages, besides other points, cases, and reasons, associated with them by the perusal of other works.

As, of course, this work is not at all a substitute for the larger works, comprising, as each of them does, a mass of points, cases, and comments, necessarily excluded from this—and as in fact it is entirely different, in its nature and the purposes for which it is adapted, from the works on which it is founded, and from all other works on Common Law, and therefore cannot be regarded as competing with any of them; so, on the other hand, the writer believes that, for the same reasons, none of them would

serve as a substitute for it; and that consequently *it may be considered as simply an attempt to supply a vacant place.*

Very great has been the expenditure of time and thought which the preparation of it has involved. It bears the same relation to the text-books cited in it, as those books bear to the Reports and Treatises on which they are founded. And, in general, if the Reader wishes to have the unabridged and unaltered language of the writers cited upon any point, he must turn to their pages, as referred to, for their precise language, as well as for the cases, reasons, illustrations and other matter connected with such point, to be found in their writings. To have added these would neither have been right towards those Authors, nor compatible with the limited bulk, price, and design of this volume. . . .

The points connected with Conveyancing, though they may have been decided in the Common Law Courts, are purposely omitted. For these the Reader is referred to the Author's Compendium of the Law of Real and Personal Property. . . .

To be concise, and yet clear, is admitted to be a very difficult task. Although the points comprised in the following pages are expressed in the smallest possible compass, the Author trusts that they are clearly expressed. The Student, however, may probably regard this as a "hard book." But how can a book be otherwise than hard, in some parts and in some degree at least, when many of the distinctions and qualifications are in their own nature complex or refined; and when it contains such a multitude of points in a small space? Yet it would be infinitely harder, and in fact impossible, for a Student to put himself in possession of the same number of points, if he had to collect these points when scattered over thousands of pages in many different volumes, and

intermixed with a number of other minor points; and if he had to pick up part of a rule from one book, part from another book, and important distinctions, qualifications, or exceptions from other books. The difficulty, in the case of a book like this, is on the surface, and therefore strikes at once. But it is very far less than the more latent difficulty of mastering the same number of points in any other way. In the one case, the crowding of propositions on the mind is of course attended with a sense of labour; but that labour is all effectual, and is short. In the other case, the Student passes on more easily and pleasantly, and he fancies he has made great progress, because he has waded through a great number of pages. But if the result of the two modes of study were compared, the knowledge acquired in the latter case would be found to be very little more than a general and inaccurate impression, limited to a few points, and likely to fade, and incapable of being revived without great labour; whereas the knowledge acquired by the help of a book like the present, would be found to be comparatively specific, accurate, and complete, and would have been gained in an incomparably shorter time, and at a trifling cost, and may be revived easily and speedily. . . .



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Abbreviations.	Fuller Titles.	Editions (a).
Abbott . . .	Abbott on Shipping . . .	13th
Ad. Con. . .	Addison on Contracts . . .	9th
Ad. Torts (Cases) . .	Addison on Torts . . .	7th
Anson . . .	Anson on Contracts . . .	9th
Arnould . . .	Arnould on Insurance . . .	6th
Atk. . .	Atkinson's Magistrates' Annual Practice, 1897.	
Banning . . .	Banning on Limitation of Actions	2nd
Best . . .	Best's Law of Evidence . . .	8th
Bl. Com. . .	Blackstone's Commentaries.	
Broom, Com. . .	Broom's Commentaries . . .	9th
Bunyon . . .	Bunyon on Life Insurance . . .	3rd
Burn . . .	Burn's Justice . . .	29th
Burton . . .	Burton's Compendium.	
Byles . . .	Byles on Bills . . .	15th
Chalm. B. . .	Chalmer's Bills of Exchange . . .	5th
Chalm. Sale . . .	Chalmer's Sale of Goods . . .	3rd
Chit. Archb. . .	Chitty's Archbold's Practice of the Q. B. D. . . .	14th
Chit. Con. . .	Chitty on Contracts . . .	13th
Chit. & Tem. on Car.	Chitty and Temple on Carriers . .	1st
Co. Litt. . .	Coke upon Littleton.	
Cole Eject. . .	Cole on Ejectment . . .	1st
Cross . . .	Cross on Lien . . .	1st
Cru. . .	Cruise's Digest . . .	3rd
Dixon . . .	Dixon's Law of the Farm . . .	5th
Edm. . .	Edmunds on Patents . . .	2nd
Gale . . .	Gale on Easements . . .	6th
Gilbert . . .	Gilbert on Distress . . .	4th
Goddard . . .	Goddard on Easements . . .	5th
Grant . . .	Grant on Bankers . . .	5th
Jones Bail. . .	Jones on Bailments . . .	4th
Lindley C. . .	Lindley on Companies . . .	5th
Lindley . . .	Lindley on Partnership . . .	6th
Locke . . .	Locke's Game Laws . . .	5th
Lush . . .	Lush's Husband and Wife . . .	2nd
Macdonell . . .	Macdonell on Master and Servant	1st
Mayne . . .	Mayne on Damages . . .	5th

(a) These are the editions used, except where otherwise specified.

Abbreviations.	Fuller Titles.	Editions.
Odgers . . .	Odgers on Libel and Slander . . .	3rd
Odgers P. . .	Odger's Principles of Pleading . . .	3rd
Oke . . .	Oke's Game Laws . . .	4th
Oliph. . .	Oliphant on Horses . . .	5th
Pol. Con. . .	Pollock's Principles of Contract . . .	6th
Pol. Dig. of Part. . .	Pollock's Digest of the Law of Partnership . . .	6th
Pol. Torts . . .	Pollock on Torts . . .	4th
Powell . . .	Powell on Evidence . . .	6th
Pres. Shep. T. . .	Sheppard's Touchstone by Preston.	
Pulling . . .	Pulling on Attorneys and Solicitors . . .	3rd
Rosc. . .	Roscoe on Evidence . . .	16th
Scrut. . .	Scrutton's Charter-parties and Bills of Lading . . .	3rd
Sebastian . . .	Sebastian on Trade Marks . . .	3rd
Simpson . . .	Simpson on the Law of Infants . . .	2nd
Sm. L. C. . .	Smith's Leading Cases . . .	10th
Sm. Merc. Law . .	Smith's Compendium of Mercantile Law . . .	10th
Sm. Eq. Manual . .	Smith's (Josiah W.) Manual of Equity . . .	13th
Sm. Law of Prop. .	Smith's Compendium of the Law of Real and Personal Property.	6th
Steer Par. Law . .	Steer's Parish Law . . .	4th
Ste. Com. . .	Stephen's Commentaries . . .	12th
Story Eq. . .	Story's Equity Jurisprudence.	
Story on Agency . .	Story's Law of Agency . . .	9th
Tudor Ca. on M. L.	Tudor's Leading Cases on Mercantile Law . . .	3rd
Tudor Real Prop. Ca.	Tudor's Leading Cases on Real Property and Conveyancing . .	3rd
Wharton . . .	Wharton's Law Lexicon . . .	9th
Wms. Ex. . .	Williams's Executors . . .	9th
Williams . . .	Williams's Law of Personal Property . . .	14th
Woodf. . .	Woodfall's Landlord and Tenant	15th

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THE MEANING AND SOURCES OF COMMON LAW.

THE MEANING AND SOURCES OF COMMON LAW.

THE term "common law" strictly signifies that particular portion of municipal law which was in former times administered exclusively by the common law tribunals, and is now administered by them concurrently with and modified by equitable doctrines. (Broom, Com. 2.) **1**

The Common Law is composed of two elements, the *lex scripta* and the *lex non scripta*. **2**

The *lex scripta*, or written law, comprises the statute law of the land; the *lex non scripta*, or unwritten law, comprises and mainly consists of custom. (Broom, 2, 7.) **3**

The *lex non scripta* is declared by the judges, whose decisions are guided by established precedents. (Broom, Com. 19.) Custom is not in itself law; but it becomes so when it is recognized as binding by the judges, or is incorporated into a statute. **4**

With the exception of their criminal jurisdiction, and their administration of the law of real property, and the jurisdiction of the Court of Exchequer in matters of revenue, the business of our Common Law Courts, before the Supreme Court of Judicature Act, 1873, might be arranged under two heads—Contracts and Torts. **5**

Of what the business of the common law Courts consisted.

The system of Equity, administered in the Court of Chancery, grew up in consequence of the refusal or inability of the Common Law Courts to grant relief in many cases where relief was reasonably claimed. **6**

Origin of equity.

Judicature
Acts, 1873,
1875.

The object of the Judicature Acts (1873 and 1875) was to fuse the two systems of Law and Equity, and accordingly the Common Law and Equity Courts were merged in one High Court with different Divisions. But in practice the distinction between Common Law and Equity still to a great extent exists. In particular, by sect. 34 of the Judicature Act, 1873, most of the matters in which Equity had formerly enjoyed an exclusive or concurrent jurisdiction were assigned to the Chancery Division of the High Court. The Judicature Act, however, provides that where the rules of Law and Equity conflict, the latter shall prevail. 7

Division of
the subject
of common
law.

The subject of Common Law may therefore be conveniently treated of under the two headings of Torts and Contracts; but it must be remembered that much of the law relating thereto is derived from Chancery. 8

PART I.
OF TORTS.



TITLE I.

Of Torts generally.

CHAPTER I.

DEFINITION AND CLASSIFICATION OF TORTS.

A TORT is a wrong independent of contract, giving rise to a civil remedy. (Ad. Torts, 1; Pol. Torts, 4.) **9**

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A contract is founded upon consent. It requires privity more or less immediate between the contracting parties; whereas to constitute a right of action for tort no privity is needed. (Broom, Com. 982-3.) In other words, a breach of contract is the violation of a right in personam, or right against a particular person or persons; a tort is the violation of a jus in rem, or right against the world. The measure of damages in a breach of contract is generally more or less nearly determined by the stipulations of the parties; but in tort, the measure of damages is not strictly limited nor capable of being indicated with precision. (Broom, Com. 983.) The same conduct, however, may be a tort and a breach of contract. Thus carriers warrant the transportation and delivery of goods entrusted to them; solicitors and surgeons undertake to discharge their duty with a reasonable amount of skill; and for any neglect or unskilfulness by individuals belonging to one of these professions a party who has been injured thereby may maintain an action either in tort for the wrong done or in contract, at his election. (Broom, Com. 769.) **10**

Definition of a tort.
Difference between breach of contract and tort.

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*Langridge v.
Levy.*

In some cases where a duty is imposed on a person by contract, and that duty is violated, a third person who is injured by the violation of it may have a remedy in tort against the wrongdoer. Thus where the plaintiff's father purchased of the defendant a gun, warranted to have been made by a particular maker, and stated at the time that the gun was required for the use of himself and his son, it was held that the plaintiff, who used the gun and was injured by its bursting, could recover damages from the defendant, it being proved that the gun had not in fact been made by the particular individual named in the warranty. (*Langridge v. Levy*, 2 M. & W. 519; (in error) 4 M. & W. 337.) Here the defendant was held liable for the tort known as Deceit. The ground of the decision, however, was that the gun was expressly bought for the son to use to the knowledge of the defendant. (*Peek v. Gurney*, L. R. 6 H. L. 377; *Heaven v. Pender*, 11 Q. B. D. 503.) **11**

Difference
between a
tort and a
crime.

A tort mainly differs from a crime in this respect—that the former is a violation of a private right, whereas the latter is a wrong done to the public. (Broom, Com. 983.) For a tort an action is brought in the name of the individual; for a crime a prosecution in the name of the Crown. A crime is punished by fine or imprisonment; for tort the person injured has his remedy in damages. The same facts may give rise to a right to sue in tort, or to prefer a criminal indictment. Thus a libeller may, in many cases, be proceeded against either by indictment or by action; the object of the first mentioned remedy being to punish the offence committed against the public, for every libel has a tendency to cause a breach of the peace on the part of the person libelled, the remedy by action being with a

view to vindicating the character of the plaintiff, and compensating him in damages for the injury sustained.

(Broom, Com. 983-4.) **12**

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The same transaction may be a breach of contract, a tort, and a crime. And accordingly, when it does not amount to a felony, redress may be obtained, first by an action *ex contractu*, when it may be viewed as a breach of contract; or secondly, by an action *ex delicto*, when it may be viewed as a tort; or thirdly, by an indictment, when it may be viewed as a crime. In the first case, the plaintiff is said to sue or recover in contract; in the second case, in tort. (See Broom, Com. 769, 983.) **13**

Transactions which have a contractive, a tortious, and a criminal aspect.

There are dicta to the effect that before the person injured by any *felonious* (a) act can seek civil redress, the matter must be heard and disposed of (by acquittal or conviction) before the proper criminal tribunal, in order that the justice of the country may be first satisfied. The rule does not extend beyond the felon himself. Doubts have been cast upon the rule, but it has never formally been overridden, though various difficulties have been placed in the way of its application. (Broom, Com. 99-102; Ad. Torts, 76; *Wells v. Abrahams*, L. R. 7 Q. B. 554; *Ex parte Ball*, 10 Ch. D. 667; *Appleby v. Franklin*, 17 Q. B. D. 93.) **14**

It is a maxim that *damnum sine injuriâ* is not actionable. **15**

Damnum sine injuriâ.

Damnum is loss or detriment to a person, which is capable, in legal contemplation, of being estimated. **16**

Injuria is a legal wrong, that is, an act or omission of which the law takes cognizance as a wrong. **17**

(a) Crimes are divided into felonies and misdemeanours owing to historical reasons. Roughly speaking, the more serious crimes are classed as felonies.

Hence the meaning of the maxim is, that loss or detriment is not a ground of action, unless it is the result of a species of wrong of which the law takes cognizance. **18**

But it must not be conclusively assumed from the mere fact of there having been no cases, that the law will not take cognizance of a right or wrong. On the subject of this paragraph, see *Day v. Brownrigg*, 10 Ch. D. 294. **19**

Injuria sine
damno.

But *injuria sine damno* may be a ground of action. For an action may be maintained for a legal wrong, though unaccompanied, in the particular instance, with any actual perceptible or appreciable loss or detriment. Thus *injuria sine damno* (in this last sense) will form a ground of action when a private legal right is violated, though the violation of it be unattended with any actual perceptible or appreciable loss or detriment in the particular case. (See *Broom*, Com. 82-9; 3 *Ste. Com.* 406.) **20**

The result is, that there are moral wrongs for which the law gives no legal remedy, though they cause great loss or detriment; and, on the other hand, there are legal wrongs for which the law does give a legal remedy, though there be only a violation of a private right, without actual loss or detriment in the particular case. **21**

Instances of
damnum sine
injuriâ.

Acts done with the lawful purpose of extending the trade and increasing the profits of a combination of shipowners, and not being unlawful, give no cause of action to those who are injured by the competition. (*Mogul Steamship Co. v. McGregor*, (1892) A. C. 25. See also *Allen v. Flood*, 32 L. J. 619.) Again, a man may, without incurring liability, so use his own property as to cause damage to his neighbour, provided

the *damnum* be not *injuriousum*, e.g., by digging wells in his land which deprive his neighbour of water percolating through the ground to him. (Broom, Com. 72-3, 76; *Corporation of Bradford v. Pickles*, (1895) A. C. 587; and see later, pars. 34-50.) **22**

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In an action against a returning officer for maliciously refusing to receive the plaintiff's vote, it was held that the action well lay, although the candidates in whose favour the vote had been tendered were in fact elected, the ground of the decision being, that the plaintiff had a legal right and privilege to give his vote, in the enjoyment of which right he had been disturbed. (Broom, Com. 83.) **23**

Instances of
injuria sine
damno.

Again, in cases of libel, and of trespass to land, and of the infringement of a patent, the mere wrongful act will be actionable without proof of special damage. (Broom, Com. 85-6.) **24**

Where there is a breach of an express contract nominal damages may be recovered, though no damage has really been sustained. (Broom, Com. 85.) **25**

Actions upon
contract.

There are certain cases in which no action will lie, unless damage can be proved. Thus slander, except in four cases, is not actionable in the absence of special damage; and a man is not liable for negligence, unless it can be shown that his act or default has caused harm to another. **26**

Injuria non
sine damno.

Torts may be classified as:—

Classification
of torts.

1. Injuries to the person, character and estate, such as assault, libel, deceit.
2. Injuries to property, such as trespass and conversion.
3. Injuries to person and property generally, such as nuisance and negligence. **27**

CHAPTER II.

EXEMPTIONS FROM LIABILITY FOR TORTS.

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CHAP. II.

THERE are certain exemptions from liability for tort due either to personal incapacity, or to special circumstances. **28**

SECTION I.

Limitations of Personal Capacity.

Sect. 1.

Generally speaking, there is no limit to personal capacity, either in becoming liable for civil injuries, or in the power of obtaining redress for them. (Pol. Torts, 48.) There are partial exceptions in the case of convicts and alien enemies, and apparent exceptions as to infants and married women. **29**

Convicts and
alien enemies

A convicted felon whose sentence is in force and unexpired, and who is not lawfully at large under any licence, cannot sue for the recovery of any property, debt or damage whatsoever. (33 & 34 Vict. c. 23, ss. 8, 30.) An alien enemy cannot sue in his own right in any English Court. **30**

Infants.

An infant cannot be made liable in tort for what is in truth a breach of contract (*Jennings v. Rundall*, 8 T. R. 335—infant hired a horse and overrode it); and no action lies against an infant for a fraud whereby he has induced another to contract with him, such as a false statement that he is of full age, but the transaction may be declared void. (Pol. Torts, 50.) But where an infant commits a wrong of which a contract is the

occasion, but only the occasion, he is liable for the committal of what is an "independent tort." (*Burnard v. Haggis*, 14 C. B. N. S. 45—an infant undergraduate hired a horse and agreed not to use it for jumping. He lent it to a friend who did use it for jumping, and the horse was fatally injured. The infant was held liable.) **31**

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At common law a married woman had to sue and be sued jointly with her husband for torts committed by her, inasmuch as her property was the husband's. Since the Married Women's Property Act, 1882, she can sue and be sued without joining her husband. If she is sued alone, damages and costs recovered against her are payable out of her separate property. (45 & 46 Vict. c. 75, s. 1.) If husband and wife sue jointly for personal injuries to the wife, the damages recovered are the wife's separate property. (*Beasley v. Roney*, (1891) 1 Q. B. 509.) She may sue her husband for the protection of her separate property; but otherwise actions for tort will not lie between husband and wife. (Pol. Torts, 52; 45 & 46 Vict. c. 75, s. 12.) Husband and wife may still sue and be sued jointly, and the husband is not relieved from liability for his wife's post-nuptial torts, and may be joined as a defendant. (*Seroka v. Kattenberg*, 17 Q. B. D. 177; Ad. Torts, 122; 2 Ste. Com. 277; Lush. 290.) **32**

Married
women.

A personal injury cannot be inflicted upon a corporation. Neither can a corporation be injured in respect of a merely personal libel, e.g., alleging corruption. The individual officers or members of the corporation are the proper plaintiffs in such a case (Pol. Torts, 53; *Mayor of Manchester v. Williams*, (1891) 1 Q. B. 94); but a trading corporation may be defamed in relation to the conduct of its business. (*South Hetton Coal Co.*

Corporations.

v. *N. E. News Association*, (1894) 1 Q. B. 133.) It is doubtful to what extent a corporation is liable for personal wrongs. (Ad. Torts, 117; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Ex. Ch.) 259; *Edwards v. Midland Rail. Co.*, 6 Q. B. D. 287; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; *Nevill v. Fine Arts and General Insurance Co.*, (1895) 2 Q. B. 156; (1897) A. C. 68.) **33**

SECTION II.

General Exceptions to Liability in Tort.

There are various conditions which, when present, will prevent an act from being wrongful which in their absence would be a wrong. There may be a privilege in respect of the person or the occasion; as in the case of acts of state, judicial acts, executive acts, quasi-judicial acts, and acts performed under statutory authority. Other exceptions are more general, such as inevitable accident, harm inflicted in the exercise of common rights, harm suffered by consent, and harm inflicted in self-defence or otherwise by necessity. This class of cases are all illustrations of the proposition that *damnum sine injuriâ*—damage unaccompanied by legal wrong—is not actionable at law. (Pol. Torts, 97-9; Ad. Torts, 47-51.) **34**

Acts of
State.

If the person or property of some person, who is not a subject of the Crown, is injured by the act of any representative of the Crown, civil or military, which act is either previously sanctioned or subsequently ratified by the Crown, an action will not lie. (Pol. Torts, 99-104; *Buron v. Denman*, L. R. 2 Ex. 167.) **35**

No action will lie against a judge for any acts done or words spoken in his judicial capacity in a Court of justice. (*Scott v. Stansfield*, L. R. 3 Ex. 220; *Anderson v. Gorrie*, (1895) 1 Q. B. 665.) But, in order to establish the exemption as regards proceedings in an inferior court, the judge must show that some matter was before him in which he had jurisdiction. This rule of immunity extends to members of naval and military courts-martial. (Pol. Torts, 104-6; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744.) **36**

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Judicial acts.

Quasi-judicial powers are such as those exercised by colleges in the universities over their fellows and scholars, by committees of clubs over their members, and by the General Council of Medical Education over registered medical practitioners. The general rule as to quasi-judicial powers is that persons executing them are protected from civil liability if they observe the rules of natural justice (such as giving the accused an opportunity of making his defence), and also the particular statutory or conventional rules, if any, which may prescribe their course of action. (Pol. Torts, 110-112; *Allbutt v. Medical Council*, 23 Q. B. D. 400; *Partridge v. Medical Council*, 25 Q. B. D. 90; *Baird v. Wells*, 44 Ch. D. 661; *Fisher v. Jackson*, (1891) 2 Ch. 84.) **37**

Quasi-judicial
acts.

No action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it causes damage. Thus, a railway company is not responsible for damage by fire caused by the escape of sparks from the engines, if the company has used due caution to prevent such escape. (*Vaughan v. Taff Vale Rail. Co.*, 5 H. & N. 679; *Smith v. L. & S. W. Rail. Co.*, L. R. 6 C. P. (Ex. Ch.) 14.) But the use of traction engines on highways, though regulated

Statutory
authority.

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by statute, is not authorized in the sense of diminishing the owner's liability for nuisance or otherwise. (*Powell v. Fall*, 5 Q. B. D. 597.) It would appear that, even in the case of traction engines, or electrical tramcars, or anything of a similar character, the owners are not responsible for an injury that happens as a natural incident of the exercise of the statutory powers, for such things must have been in the contemplation of the Legislature when it gave its sanction. (*National Telephone Co. v. Baker*, (1893) 2 Ch. 186; *Pol. Torts*, 115-121, 453.) **38**

Inevitable
accident.

An action will not lie against a person for harm resulting, by inevitable accident, from an act lawful in itself, and done in a reasonable and careful manner. Thus, if a person is out driving, and the horses run away without any fault on his part or that of his servants and do injury, he is not liable. (*Holmes v. Mather*, L. R. 10 Ex. 261.) And in a recent case it was held that a beater, who was injured by a pellet from the gun of one of a shooting party glancing from a bough, had no cause of action, there being no negligence shown. (*Stanley v. Powell*, (1891) 1 Q. B. 86; *Pol. Torts*, 121-135.) **39**

Exercise of
common
rights.

The exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage. It is chiefly in this class of cases that we meet with the phrase *damnum sine injuriâ*. (*Pol. Torts*, 136.) Competition in business, however damaging, is not actionable; nor is it a wrong even to offer advantages to customers who will deal with oneself to the exclusion of a rival. (*Mogul Steamship Co. v. McGregor*, (1892) A. C. 25.) A workman who is dismissed from his employment at the instigation of a delegate of a trade union has no cause of action against

the delegate, provided there is no breach of contract. (*Allen v. Flood*, 32 L. J. 619.) So, also, the owner of land has a right to divert or appropriate percolating water within his own land so as to deprive his neighbour of it (*Acton v. Blundell*, 12 M. & W. 324; *Chasemore v. Richards*, 7 H. L. C. 349), and the right is the same whatever his motive may be, whether malicious or otherwise. (*Corporation of Bradford v. Pickles*, (1895) A. C. 587; Pol. Torts, 135-45.) **40**

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Harm suffered by consent is, within certain limits, not a cause of civil action. The maxim is *volenti non fit injuria*. Thus, force to the person is rendered lawful by consent in such matters as surgical operations. But wilful hurt is not excused by consent or assent, if it has no reasonable object, or is unlawful (e.g., a prize fight), or is necessarily dangerous; and consent obtained by fraud is of no effect. On the same principle, when the plaintiff has voluntarily put himself in the way of risk and suffers harm, the defendant is not bound to disprove negligence. (*Ilott v. Wilkes*, 3 B. & Ald. 304; 24 & 25 Vict. c. 95, s. 1, and c. 100, s. 31.) Thus, an employer sued by a workman under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), can plead that the workman voluntarily accepted the risk of his employment (*Thomas v. Quartermaine*, 18 Q. B. D. 685); but such defence is not admissible where the risk was created by breach of a statutory duty (*Baddeley v. Earl Granville*, 19 Q. B. D. 423); and a workman is not bound to throw up his employment rather than go on working with appliances which he knows to be dangerous, and continuing to use such appliances if the employer cannot or will not give him better, is not conclusive to show that he voluntarily takes the attendant risk. (*Yarmouth v. France*, 19 Q. B. D. 647; *Membery v. G. W. Rail. Co.*, 14 App.

Acceptance of
risk.

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Cas. 179; *Smith v. Baker*, (1891) A. C. 325; Pol. Torts, 145-56.) The defence of *volenti non fit injuria* cannot be set up in answer to a claim for compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). (See below, par. 74.) **41**

Necessity. Acts otherwise tortious, done of necessity to avoid a greater harm, are justified, e.g., pulling down houses to stop a fire, or casting goods overboard to save a ship. Thus, too, trespass on land for the sake of saving life or averting harm to the owner or others is justified. (Pol. Torts, 157-8.) **42**

Self-defence. Defence of a man's own person or that of others whom he is bound to protect, or of his property or possession, against the unlawful force of another is justifiable. But the force employed in defence must not be out of proportion to the apparent urgency of the occasion. (Pol. Torts, 158-65.) **43**

SECTION III.

Effect of a Party's Death upon a Cause of Action in Tort.

Actio perso-
nalis moritur
cum personâ.

The general rule as to the effect of death of either party upon a cause of action in tort is embodied in the maxim *actio personalis moritur cum personâ*, i.e., the estate of the person wronged has no claim, and that of the wrongdoer is not liable. The maxim has even been extended to bar the right of a master to sue for loss of services of a servant injured by wrongful act or neglect, when the injury has resulted in his death. (*Osborn v. Gillett*, L. R. 8 Ex. 88.) **44**

Exceptions. There are, however, certain exceptions to the rule. Thus, by 4 Ed. 3, c. 7, and 25 Ed. 3, st. 5, c. 5, the personal representatives of a deceased person have an

action for wrongs done to his personal estate when special damage is shown. By 3 & 4 Will. 4, c. 42, actionable injuries to the real estate of any person, committed within six calendar months before his death, may be sued upon by his personal representatives, for the benefit of his personal estate, within one year after his death; and a man's estate can be made liable, through his personal representatives, for wrongs done by him within six calendar months before his death to another in respect of property real or personal. In this case, the action must be brought against the wrongdoer's representatives within six months after they have entered on their office. (Pol. Torts, 55-60; 2 Wms. Ex. 702-3, 1600; *Jenks v. Clifden* (*Viscount*), (1897) 1 Ch. 694.) **45**

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By the Fatal Accidents Act, 1846 (commonly known as Lord Campbell's Act), a further exception to the rule *actio personalis moritur cum personâ* was introduced. It was provided by that Act that when the death of a person is caused by a tort which would have entitled him or her to damages, an action for damages may be brought by his or her personal representative for the benefit of his or her wife, husband, parent, grandparent, step-parent, legitimate children, grand-children and step-children, in such shares as the jury shall direct; and the measure of damages is the pecuniary loss to the family by the death. Compensation may be given in this way, not only for an actual pecuniary loss, but even for the extinction of a reasonable expectation of pecuniary advantage, whether to be derived in money, or in the shape of maintenance, education, and social comfort, procurable by money, and which the family, but for the death of the injured person, might probably have enjoyed. But it has been held that the jury cannot

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take into consideration the funeral expenses or mourning, or the mental suffering occasioned to the family. (9 & 10 Vict. c. 93; Broom, Com. 815-7; Wms. Ex. 703-7; Ad. Torts, 608-10; 2 Rosc. 766-8; *Pym v. Great Northern Rail. Co.*, 2 B. & S. 759; 4 B. & S. 369; *Dickenson v. North Eastern Rail. Co.*, 2 H. & C. 735.) **46**

If there is no executor or administrator of the deceased person, or if, within six calendar months after the death of such person, no action is brought by or in the name of the executor or administrator, then it may be brought by or in the name of all or any of the persons, and will be for the benefit of the same persons, for whose benefit such action would have been if it had been brought by or in the name of the executor or administrator. (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95, s. 1.) **47**

If the deceased person received in his lifetime compensation for the injury, no fresh action can be brought for it after his death. (*Read v. Great Eastern Rail. Co.*, L. R. 3 Q. B. 555.) Also, if a workman contract with his employer for himself and his representatives and any person entitled in case of his death, not to claim compensation for personal injury, whether resulting in death or not, and he is afterwards killed in his employment, his widow cannot sue for damages under stat. 9 & 10 Vict. c. 93. (*Griffiths v. Dudley*, 9 Q. B. D. 357.) **48**

Where a passenger on a railway is injured by an accident, and after an interval dies in consequence thereof, his personal representative may recover the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. (*Bradshaw v. Lancashire and Yorkshire Rail. Co.*, L. R. 10 C. P. 189; and see 1 Wms. Ex. 705 *et seq.*) But where the cause of

action does not arise out of a contract, but is simply an injury to the person, no action can be brought in respect of such damage. (*Pulling v. Great Eastern Rail. Co.*, 9 Q. B. D. 110; and see 2 Rose. 1209.) **49**

The maxim *actio personalis moritur cum personâ* does not apply to a claim for compensation under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37, s. 7). **49a**

There is also an exception at common law to the maxim *actio personalis moritur cum personâ*. When specific property, or its value, belonging to another, has been appropriated by the deceased person and added to his own estate, the action does not die with the person, but such property can be traced after his death to his assets by suing the personal representatives. Thus where a man wrongfully carried away coal from a mine under another's land, who sued for the value of the coal and damages, and the wrongdoer died pending an inquiry, it was held that the wrongdoer's estate was liable to the value of the coal wrongfully taken. (*Phillips v. Homfray*, 24 Ch. D. 439-454; Pol. Torts, 65-6.) **50**

CHAPTER III.

LIABILITY FOR TORTS OF SERVANTS AND AGENTS.

PART I.
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A PERSON is answerable for the wrongful acts, or negligence, or unskilfulness of his servants, and of those whom the law denominates his servants (as being selected and appointed by him to do any work, although not in his immediate employ or under his superintendence), if such acts, negligence, or unskilfulness occurred strictly in doing that which they were employed to do, or in acting within the general scope of their authority, as his servants. And the servant is also himself liable for any injury he may have caused a third person. But where the injury, whether it was done wilfully or otherwise, was not done by the servant of a particular master strictly in doing that which he was employed to do, or in acting within the general scope of his authority, as the servant of such master, redress can only be had from him, unless the master knew the servant to be of such a character that such an injury would not be unlikely to happen. Thus, the master is responsible for injury caused by his servant in riding or driving, unless the servant cannot be regarded as having caused the injury when acting under his master's orders, but in pursuing his own wrongful devices. The owner of a carriage let out to hire is responsible for his driver, unless the injury happens in consequence of the latter being required by the hirer to do some unusual or improper thing. (2 Ste. Com. 242-5; Ad. Torts, 98-109; *Seymour v. Green-*

wood, 7 H. & N. 355; *Williams v. Jones*, 3 H. & C. 256, 602; *Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Poulton v. London & S. W. Rail. Co.*, L. R. 2 Q. B. 534; *Bayley v. Manchester, &c. Rail. Co.*, L. R. (Ex. Ch.) 8 C. P. 148; *Lord Bolingbroke v. Local Board of Swindon New Town*, L. R. 9 C. P. 575; *Rourke v. White Moss Colliery Co.*, 2 C. P. D. 205; *Whiteley v. Pepper*, 2 Q. B. D. 276; *Hughes v. Percival*, 8 App. Cas. 443; *Abraham v. Deakin*, (1891) 1 Q. B. 516; *Black v. Christ Church Finance Co.*, (1894) A. C. 48.) And a cab proprietor is liable for an accident occasioned by a driver who has paid a certain sum for the use of the cab. (*Venables v. Smith*, 2 Q. B. D. 279; *King v. London Cab Co.*, 23 Q. B. D. 281; *Keen v. Henry*, (1894) 1 Q. B. 292; 6 & 7 Vict. c. 86); but not if the cabdriver hires the cab only and himself provides the horse. (*King v. Spurr*, 8 Q. B. D. 104.)

51

A man is liable for the wrongs of his servant when he is acting in the course of his employment, because he is about his employer's affairs, and a man is bound to see that his affairs are conducted with due regard to the safety of others. The rule is based on the maxims, "Qui facit per alium, facit per se," and "Qui sentit commodum, sentire debet et onus." But where the servant is not acting within the scope of his employment, the master is neither actually nor virtually acting at all, any more than if he were a stranger; nor is he reaping any advantage by employing a servant to act for him; and therefore there is no reason why he should bear any corresponding loss from the servant's misconduct. And as to the point that the third person would commonly go without compensation if he could only sue the servant, he would be in no worse condition

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than if the person who did the injury were not a servant, but a poor man acting as a principal. Nor could the expediency of giving the injured person compensation be a sufficient reason for making the master suffer, when he was wholly without blame. **52**

Liability for
torts of agent.

For the same reason a principal is liable for the torts of his agent committed within the scope of his authority. He is also, of course, liable if he actually directed the tortious act, or took the advantage of it. **53**

There is an implied authority to a person to do all those things that are necessary for the protection of property entrusted to him, or for fulfilling the duty which he has to perform. But, any further than is required for its actual protection or recovery, a person entrusted with property has no implied authority to put the law in motion with reference to an offence committed in connection with that property, so as to render the employer responsible for acts done by the employed in reference to the property. (*Allen v. London & S. W. Rail. Co.*, L. R. 6 Q. B. 65, 69, 72; *Abrahams v. Deakin*, (1891) 1 Q. B. 516.) **54**

For a crime or wilful injury committed by the servant or agent outside the scope of his employment, he himself is alone liable, unless done by the master's command or encouragement; but a master may be liable even for wilful and deliberate wrongs committed by his servant or agent, provided they be done on the master's account and for his purposes, and this although they are of a kind actually forbidden by the master. (*Limpus v. London General Omnibus Co.*, 1 H. & C. 526; *Dyer v. Munday*, (1895) 1 Q. B. 742; *Collman v. Mills*, (1897) 1 Q. B. 396; 2 Ste. Com. 244; 2 Rosc. 734.)

55

Independent
contractor.

A servant is one whom the master controls. There-

fore the employer is not liable for the acts or omissions of an independent contractor, i.e., one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. The contractor and his servant are responsible, and, in general, not the person who employed the contractor. And hence where the contractor employed a sub-contractor, the sub-contractor is responsible for the injury caused by his own servants, and the contractor himself is not responsible. (See *Ad. Torts*, 102-6; 2 *Rosc.* 727-8; *Pol. Torts*, 72; *Hole v. Sittingbourne Rail.*, 6 H. & N. 488; *Gray v. Pullen*, 5 B. & S. (Ex. Ch.) 970; *Bower v. Peate*, 1 Q. B. D. 321; *Alldred v. West Metropolitan Tramways Co.*, (1891) 2 Q. B. 398.) **56**

An owner of a carriage let out to hire is responsible for the negligence of his driver unless the injury happens in consequence of the hirer requiring the driver to do some unusual or improper thing. (*Quarman v. Burnett*, 6 M. & W. 499.) **57**

But the remoter employer may sometimes be liable, notwithstanding his employment of an independent contractor. Thus he is liable if the injuries are such as, in the natural course of things, may be expected to arise from the work ordered to be done if proper precautions are not taken to prevent them (*Bower v. Peate*, 1 Q. B. D. 321; *Hughes v. Percival*, 8 App. Cas. 443; *Hardaker v. Idle District Council*, (1896) 1 Q. B. 335); or if the contractor's servants are under the control of the remoter employer, and are acting substantially as his servants. (*Burgess v. Gray*, 1 C. B. 578; *Rourke v. White Moss Colliery Co.*, 2 C. P. D.

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205.) And if a contractor is employed to do what is unlawful in itself, or which cannot be done without creating a nuisance, the remoter employer as well as the contractor is liable. (*Ellis v. Sheffield Gas Consumers' Co.*, 2 E. & B. 757; *Hardaker v. Idle District Council*, (1896) 1 Q. B. 335.) **58**

Where a man is subject to a positive duty he will be held liable for failure to adequately perform it, whether the failure was that of himself, his servant, or an independent contractor. Special duties created by statute, as condition attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. (Pol. Torts, 67; *Gray v. Pullen*, 5 B. & S. (Ex. Ch.) 970.) **59**

Responsi-
bility of a
person pro-
viding accom-
modation.

If a man undertakes, for a valuable consideration, to provide accommodation for the persons of others (as by conveying them, or erecting a stand for them at a race-course), he is liable to them for any injury they sustain by reason of the negligence or unskilfulness of the manufacturer or contractor, or of the servants of the manufacturer or contractor, whom he employed. (*Francis v. Cockrell*, L. R. 5 Q. B. 184; (Ex. Ch.) 501.) In such cases there is also a duty independent of contract. (*Heaven v. Pender*, 11 Q. B. D. 503; Pol. Torts, 68; 463-4.) **60**

Workmen's
Compensa-
tion Act,
1897.

Persons liable to pay compensation in accordance with the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), remain so liable notwithstanding the employment of a contractor. (Sect. 4, see Appendix.) **60a**

Course of
employment.

As has been said above, a master is liable for the neglect or default of his servant while acting in the course of his employment. Thus where a servant left his horse and cart unattended, to go home to his dinner

at the time allowed him for his meal, though told not to go home for it, and the horse, which he had placed before his house, ran away and did damage, the servant was deemed to have been guilty of negligence when acting within the scope of his employment, which was to have charge of the horse and the cart, and the master was held liable. (*Whatman v. Pearson*, L. R. 2 C. P. 422.) But, on the other hand, where a carman, carter, or coachman does an injury in driving where he had no business to be driving, it has been held that the master is not liable, because the servant is not doing what he has been employed to do, or acting in the course of his employment, but the contrary. (*Storey v. Ashton*, L. R. 4 Q. B. 476; *Rayner v. Mitchell*, 2 C. P. D. 357; and see cases cited to par. 51.) **61**

Where the defendant employed a carpenter to make a signboard, and obtained permission for him to make it in the plaintiff's shed, and the carpenter, in lighting his pipe, negligently set fire to the shed, it was held that the plaintiff could not recover against the defendant. (*Williams v. Jones*, 3 H. & C. 256, 602.)

62

In a recent case the facts were as follows:—The driver of an omnibus was forbidden by a policeman to continue driving, as he was not sober. A bystander volunteered to drive, and was authorized to do so by the driver, but the master of the omnibus driver was not communicated with. Owing to the volunteer driver's negligence the plaintiff was injured. It was held that the master was not liable, as the servant had no authority, express or implied, to delegate his duties. (*Gwilliam v. Twist*, (1895) 2 Q. B. 84.) But where the negligence of a servant is the effective cause of an injury, the intervention, between the negligence of the servant

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and the injury, of the negligence of another person which immediately causes the injury, does not relieve the master from his liability for the negligence of his servant. (*Englehart v. Farrant*, (1897) 1 Q. B. 240.) **63**

The hirer of a carriage and horse is liable in respect of injury to the same the result of his servant's negligent driving, even when the servant was driving the horse and carriage for his own purpose, and in disobedience to his master's orders. The liability here is on the bailment, not in tort. (*Coupé Co. v. Maddick*, (1891) 2 Q. B. 413.) **64**

Liability for
injury to
servants.

An employer is responsible for an injury to his servant or to the servant of a contractor or person whom he employs, arising from his (the employer's) negligence, in a case in which it was peculiarly necessary that care should have been taken by him. (*Clarke v. Holmes*, 7 H. & N. 937; *Fowler v. Lock*, L. R. 10 C. P. 90.) But not if the servant knew the danger of the work, and voluntarily takes the attendant risk. (*Woodley v. Metropolitan District Rail. Co.*, 2 Ex. D. 384; *Thomas v. Quartermaine*, 18 Q. B. D. 685; *Yarmouth v. France*, 19 Q. B. D. 647; *Smith v. Baker*, (1891) A. C. 325.) **65**

In order to constitute a *primâ facie* cause of action by a servant against his master for injuries sustained through the negligence of the master, there must be knowledge of the existence of the danger by the master, and ignorance of the existence of the danger by the servant, and these two facts must be alleged in the claim. (*Griffiths v. London and St. Katherine Docks Co.*, 13 Q. B. D. 259.) **66**

Prior to the statute 43 & 44 Vict. c. 42 (*a*), a master was not responsible for an injury happening to one of

(*a*) See Appendix.

his servants, in consequence of the negligence of another of his servants; provided the servants were engaged in one common employment, or in accomplishing one common general object; though not necessarily one common, immediate, or particular object, and provided the servant was not exposed to unreasonable risks, and the master endeavoured to select proper servants, and did not knowingly acquiesce in the negligence. This principle applies even to railway companies and their servants; and has been held to apply to cases in which the negligent servant was of superior authority, whose lawful orders the injured servant was bound to obey (Ad. Torts, 109; 2 Rose. 759; Ad. Con. 842; Pol. Torts, 88-93; *Priestley v. Fowler*, 3 M. & W. 1; *Feltham v. England*, L. R. 2 Q. B. 33; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Hedley v. Pinkney & Son SS. Co.*, (1892) 1 Q. B. 58; (1894) A. C. 222); but servants of a sub-contractor are not, for this purpose, fellow servants of the servant directly employed by the principal contractor. (*Johnson v. Lindsay*, (1891) A. C. 371.) **67**

If a person comes forward as a volunteer, and offers to assist servants engaged in a difficult or dangerous work, and gets injured through negligence of one of the servants, the master is not responsible for the injury. (*Potter v. Faulkner*, 1 B. & S. 800.) But if he is assisting the defendant's servant, with the defendant's assent, for a purpose in which he and the defendant have a common interest, as, for instance, for the purpose of expediting the delivery of his own goods, he is not a mere volunteer, and is entitled to recover if he is injured by the negligence of the defendant's servants. (*Wright v. L. & N. W. Rail. Co.*, 1 Q. B. D. 252.) **68**

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The doctrine
of common
employment.

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The principle of the exception which exempts a master from liability to a servant, for injury caused by the negligence of a fellow servant, is, that the risk is contemplated by the servant when he enters the service; and that he undertakes the risk as incident to his employment. And hence this exception applies in cases where, although the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which have to be considered in his wages. Thus, whenever an employment, in the service of a railway company, is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such employment, and within the principle. (Pol. Torts, 90-2; *Tunney v. Midland Rail. Co.*, L. R. 1 C. P. 291; *Lovell v. Howell*, L. R. 1 C. P. D. 161; *Charles v. Taylor*, 3 C. P. D. 492.) **69**

The Em-
ployers'
Liability Act,
1880.

The stat. 43 & 44 Vict. c. 42 (*b*), now renders employers liable for injuries caused to workmen in their employ by defective machinery, &c., by the negligence, act, or omission of any persons in their employ in a position of authority over the injured workman, and by the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive, engine or train upon a railway, to a limited extent, and with certain exceptions. But notice of the injury must be given in writing, and the claim

(*b*) See Appendix.

is enforceable in the first instance in the County Court. The maximum amount of compensation recoverable shall not exceed the total earnings during the three years preceding the injury. The word "workman" has a limited meaning. (See 38 & 39 Vict. c. 90, s. 10; *Pearce v. Lansdowne*, 62 L. J. Q. B. 441; *McCord v. Cammell & Co.*, (1896) A. C. 57.) **70**

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The effect of that Act is to negative the implied contract that the employer shall not be liable for injury to a workman caused by the negligence of a fellow workman, in the cases to which it applies. But contributory negligence on the part of the injured workman is a defence. (See *Stuart v. Evans*, 49 L. T. 138.) **71**

In case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, can bring the action. (43 & 44 Vict. c. 42, s. 1.) **72**

A workman can "contract out" of the Act, i.e., bind himself by contract with his employer not to claim compensation under the Act. (*Griffiths v. Dudley*, 9 Q. B. D. 357; *Clements v. London & N. W. Rail. Co.*, (1894) 2 Q. B. 482.) **73**

By the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37) (c), which comes into operation on July 1st, 1898, where personal injury by accident arising out of and in the course of certain employments is caused to a workman, his employer shall be liable to pay compensation in accordance with the Act. The Act applies to employments in or about a railway, factory, mine, quarry, or engineering work, or in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery

Workmen's
Compensation Act,
1897.

(c) See the Act set out in Appendix.

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driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. Notice of the accident must be given. A scale of compensation to be paid by the employer where the injury results in death or total or partial incapacity is given in the First Schedule to the Act. It is provided that the employer shall not be liable under the Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed. If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed. **74**

Contracting
out.

If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation for the workmen is on the whole not less favourable to the workmen than the Workmen's Compensation Act, 1897, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of the Act, but, save as aforesaid, the Act is to apply notwithstanding any contract to the contrary. (Sect. 3.) **75**

Questions arising in any proceedings under the Act as to the liability to pay compensation, the amount thereof, &c., if not settled by agreement, are to be settled by arbitration. (Sect. 1, sub-s. 3.) **75a**

When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in the Workmen's Compensation Act, 1897, is to affect any civil liability of the employer, but in that case the workman may, at his option, either claim com-

pensation under the Act, or take the same proceedings as were open to him before the Act; but the employer is not to be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under the Act. (Sect. 1, sub-s. 2 (b).) **75b**

It will be seen that the Workmen's Compensation Act, 1897, not only increases the employer's liability for the torts of his servants, but also practically makes it a term of the contract between employer and employed, in the employments which it affects, that the employer shall compensate the workman for any injury he receives, not caused by his own wilful misconduct, in the course of the employment. **75c**

CHAPTER IV.

REMEDIES FOR TORTS.

PART I.
TIT. I.
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Judicial and
extra-judicial
redress.

REDRESS for an actionable wrong may be judicial or extra-judicial. Extra-judicial remedies are such as expulsion of a trespasser, retaking of goods by the rightful possessor, distress damage feasant, and abatement of nuisances. Judicial remedies are the awarding of damages, and the granting of an injunction. (Pol. Torts, 166-79.) **76**

Defence.

The defence, even by force, of oneself, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant, is a preventive course which the law allows; and the breach of the peace which results is chargeable upon him who began the affray. But care must be taken that the resistance does not exceed the bounds of mere defence, and prevention; for then the defender would himself become an aggressor. Self-defence is not, however, properly speaking, an extra-judicial remedy, or remedy by act of party, but a mode of preventing an injury. (See 3 Ste. Com. 265-6; Pol. Torts. 167.) **77**

Extra-
judicial
remedies or
redress by the
act of the
parties.

Of redress by the act of the injured party there are several modes:—(1) recaption or reprisal, i.e., the recovery by the act of the party deprived of his goods, or of his wife, child, or servant (but see *R. v. Jackson*, (1891) 1 Q. B. 671); (2) entry on lands when another person without any right has taken possession of them.

If, however, a person enters with a strong force, or with violence, this amounts to a breach of the peace, and is punishable as such (5 Ric. II. st. 1, c. 7; 15 Ric. II. c. 2; 31 Eliz. c. 11; 21 Jac. I. c. 15); (3) abatement or removal of nuisances (see pars. 398-9, below); (4) distress for animals or chattels damage feasant. **78**

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An owner or occupier of land may seize animals and chattels injuring or trespassing upon his land, and detain them until a fair compensation for the injury is tendered to him, unless they are under the personal care and the immediate control of some one. But he must distrain them at the time, and before they leave his land. If, however, the trespassing of cattle is owing to the fault of the owner of the land, in not fencing where he ought, and there is no default on the part of the persons in charge of the cattle, no distress can be made. (Ad. Torts. 399-402; 3 Ste. Com. 270; Gilbert, 24.) **79**

Distress for
damage
feasant.

Judicial remedies are the awarding of damages, and the granting of an injunction. Damages may be nominal, ordinary, or exemplary, or vindictive. (See below, Part III. Tit. I. Chapter I.) An injunction granted to restrain the commission of wrongful acts is threatened, or the continuance of a wrongful course of action already begun, where the remedy of damages would be inadequate or practically worthless. (Pol. Torts, 178.) Thus, the continuance of a nuisance, the obstruction of light, the infringement of copyright and trade marks, and the publication of a libel in certain cases, will be restrained by injunction. **80**

Judicial
remedies.

Where the law requires the performance of an act for the benefit of another, or forbids that which may prejudice another, though the law gives no action expressly, yet the party injured by the violation of the law is

Where an
action may be
maintained.

nevertheless entitled to an action. But an action will not lie for the infringement of a right created by a statute which provides another remedy for such infringement; and there is no private redress for breach of a statutory duty unless the harm suffered is within the mischief aimed at by the statute. (Broom, Com. 750, 759-60; *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. Div. 441; *Saunders v. Holborn District Board of Works*, (1895) 1 Q. B. 64; *Gorris v. Scott*, L. R. 9 Ex. 125.) **81**

It has been said above that there are dicta to the effect that before the person injured by any *felonious* act can seek redress, the matter must be heard and disposed of before the proper criminal tribunal. The rule does not extend beyond the felon himself; and the plaintiff may show that prosecution is impossible (as by the death of the felon), or that he has endeavoured to bring the offender to justice, and has failed without any fault of his own. (Pol. Torts, 185-7; and see par. 14 above.) **82**

Joint tort-
feasors.

Where two or more persons are liable to be jointly sued for an injury resulting from their common act, each is responsible for the entire injury. (Ad. Torts, 93.) **83**

If two commit a joint tort the judgment against one is of itself without execution a sufficient bar to an action against the other for the same cause. No contribution can be claimed as between wrongdoers. If therefore a plaintiff, who has recovered damages against two defendants for a joint trespass, levy the whole damages on one of them, that one has no claim for a moiety of the damages from the other. (Ad. Torts, 93-5; *Merryweather v. Nixan*, 8 T. R. 186.) But if the wrongful act is not clearly illegal, but may have been done in good faith, contribution or indemnity can be claimed.

Thus an auctioneer, who in good faith sells goods on behalf of a person who turns out to have no right to dispose of them, is entitled to be indemnified by that person against the resulting liability to the true owner. So, too, the statutory liability created by the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), is qualified by a right to recover contribution in all cases. (Sect. 5.)

84

Every person who does a wrong, or does a legal act in a careless and improper manner, is at least responsible for all the mischievous consequences that have resulted and might reasonably be expected to result under ordinary circumstances from such misconduct. (Broom, Com. 95.)

85

As a general rule, a person may not redress a wrong by doing a wrong to him who has done the wrong sought to be redressed. (*Ibbottson v. Peat*, 3 H. & C. 644.)

86

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Responsi-
bility for con-
sequences of
tort.

Redressing
one wrong by
another.

TITLE II.

Injuries to the Person, Character, and Estate.

CHAPTER I.

INFRINGEMENTS OF RIGHTS OF CORPORAL SECURITY.

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Right to life
and corporal
security.

Injuries to
corporal
security.

Evil intent.

LIFE is the immediate gift of God, a right inherent by nature in every individual. (11 Bl. Com. 129, 134.)

And as a general rule, every one is also entitled to immunity from all corporal insults and injuries. **87**

Injuries to corporal security are either direct or consequential. (Broom, Com. 782.) **88**

In order to maintain an action for a bodily injury, whether direct or consequential, it is not essential to show that it originated in any evil intent, or was wilful. A person may be sued for an act done accidentally or by mistake, unless it was unavoidable or occasioned by the plaintiff's negligence. Frequently, however, such injuries may be made the subject of a criminal prosecution; and in that point of view the existence of a criminal intent may be most material. (Broom, Com. 782-3; 2 Rose. 913; Ad. Torts, 17, 139; *Skelton v. London and N. W. Rail. Co.*, L. R. 2 C. P. 631; *Holmes v. Mather*, L. R. 10 Ex. 261; *Stanley v. Powell*, (1891) 1 Q. B. 86.) **89**

Corporal security may be directly affected by threats, assault, battery, wounding, or mayhem. **90**

1. Threats.

1. Threats of bodily hurt, through fear of which a

person's business is interrupted, are a ground of action. But they do not constitute a ground of action where they produce no inconvenience. (3 Ste. Com. 411 ; Ad. Torts, 7.) **91**

2. A laying hands on the person of another, or touching him directly or indirectly (as by overturning his carriage or chair), whether intentionally or not, or an apparent attempt or offer, coupled with a present ability, to do hurt to the person of another, constitutes an assault. So that even the holding up a fist or shaking a whip, when near enough to be able to hit, or advancing with a whip or a fist uplifted in a threatening manner, is an assault unless words accompanying the threatening gesture deprive it of the character of an assault. (Ad. Torts, 137 ; Broom, Com. 784 ; 2 Rose. 913 : Pol. Torts, 198.) **92**

3. A battery includes an assault ; but as distinguished from a mere assault, it is the actual and unwarrantable striking a person, or in any way touching him, in a violent, angry, rough, rude, or insolent manner. And of this nature is the act of pouring water on a person, or spitting in his face. (Ad. Torts, 138 ; Broom, Com. 784-6 : 3 Ste. Com. 411 ; 2 Rose. 913.) **93**

4. Wounding is an aggravated species of battery, amounting to a bodily hurt. **94**

5. Mayhem is the depriving a person of, or injuring, a member of the body which is available for fighting (such as a leg, an arm, an eye, or a fore tooth), or otherwise injuring him corporally in such a manner as to diminish his power of fighting or defending himself. And for this, or for wounding, heavy damages are recoverable, unless the act can be justified or excused. (Ad. Torts, 138 ; 3 Ste. Com. 411 ; Wharton.) **95**

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Assault and
battery in
defence.

If the plaintiff was the aggressor, and struck or even only assaulted the defendant in the first instance, and the act of the defendant was in actual self-defence, and not altogether disproportioned to the battery or assault by the plaintiff, it is justifiable. And an assault and battery is justifiable when in actual defence of a wife or husband, parent or child, master or servant, neighbour or friend. But if a blow is struck after all danger is past it is not justifiable. (Ad. Torts, 139-44; Broom, Com. 785; 3 Ste. Com. 412; 2 Rose. 913-4; Pol. Torts, 201.) **96**

Where
mayhem is
excusable.

When a person has been assaulted in such a way as to put him in fear of grievous bodily harm, mayhem inflicted in self-defence is excusable. **97**

Dispropor-
tionate injury
in return.

But a person may not inflict an injury in self-defence wholly disproportionate to the injury he has received or has reason to apprehend. (Ad. Torts, 140; 2 Rose. 914.) **98**

Forcible
ejection, or
assault and
battery in
defence of
property.

A churchwarden or beadle or constable may, if necessary, lay hands upon a person, to turn him out of church or any duly certified place of religious worship, or burial ground, for improper behaviour. (Broom, Com. 786; 3 Ste. Com. 412; Ad. Torts, 156-7.) **99**

An assault and battery may also be justified on the ground of its being in defence of the possession of a house or close, or of chattels. If a person forcibly enters into a house he may be forcibly ejected. If he enters quietly, he must be requested to retire before he can be lawfully turned out, and then, if he refuses to retire, the owner may compel him. But in neither case may an unnecessary degree of force be resorted to. (Ad. Torts, 140-3; Broom, Com. 785; 3 Ste. Com. 412; 2 Rose. 915; Atk. 196.) **100**

Moderate
chastisement

An assault and battery is also justifiable when it

amounts to moderate and needful chastisement of a child, or an apprentice, or a scholar, or a mariner on board a merchant vessel; but a husband is not justified in assaulting or imprisoning his wife in order to force her to grant him conjugal rights. (Ad. Torts, 144; *R. v. Jackson*, (1897) 1 Q. B. 671.) **101**

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CHAP. I.

of child,
apprentice, or
mariner.

In the case of an affray any person is justified in interfering and using such a degree of force as may be necessary for the purpose of separating the combatants and putting an end to it. (Ad. Torts, 144.) **102**

Putting down
an affray.

Cases of assault may be tried before two justices; and if they give a certificate of dismissal to the party accused, or if he shall have been convicted, and paid the fine, or suffered the imprisonment, he shall be released from all further proceedings, civil or criminal, for the same cause. But if the justices merely order the accused to enter into recognizances to keep the peace and pay the recognizance fee, this will be no bar to civil proceedings. (24 & 25 Vict. c. 100; Ad. Torts, 145.) **103**

Mode of
redress for
assault.

The setting of spring guns, man-traps, or engines calculated to destroy human life or inflict grievous bodily harm upon trespassers and others coming in contact therewith, is a misdemeanour. But the setting of guns or traps usually used to destroy vermin, and the setting of spring guns, man-traps, or other engines in a dwelling-house for its protection in the night-time, is not illegal. (24 & 25 Vict. c. 100, s. 31.) **104**

Spring guns.

Consequential, as distinguished from direct injuries, frequently arise from nuisances or from negligence. (See *infra*, pars. 392-437.) **105**

Injuries from
nuisances or
negligence.

CHAPTER II.

INFRINGEMENTS OF RIGHTS OF CORPORAL LIBERTY.

PART I.
TIT. II.
CHAP. II.

Corporal
liberty
defined.

How violated.

Definition of
wrongful or
false im-
prisonment.

In what it
consists.

Authority of
a justice of
the peace to
arrest.

EVERY adult has an inherent right of personal liberty, which consists in the power of locomotion without restraint other than by the due course of law. (1 Ste. Com. 144.) **106**

This right may be violated by wrongful, usually termed false, imprisonment, or by wrongful, usually termed malicious, arrest. **107**

Wrongful or false imprisonment is a trespass committed by arresting and detaining a person without legal grounds, or without legal warrant duly executed, whether such detention be in a prison or in a private house, or in the street or elsewhere. (Ad. Torts, 146-7; Broom, Com. 823; 3 Ste. Com. 423-4; 2 Rosc. 920; Pol. Torts, 202-8.) **108**

To constitute imprisonment, it is not necessary that the person said to be imprisoned should be under any physical restraint or confinement. Any restraint on the free power of locomotion in a lawful direction, though it be only by a show of force, or even by mere show of authority, constitutes imprisonment. But a partial restraint of the power of locomotion, such as stopping a person insisting upon a certain right of way, from proceeding onwards along that way is not an imprisonment. (Ad. Torts, 146-7; 2 Rosc. 920.) **109**

If a justice of the peace sees a felony or other breach of the peace committed in his presence, he may personally apprehend the offender or command any other

person to apprehend him; but if the offence is committed in his absence, he must issue his warrant in writing to apprehend the offender. (Broom, Com. 831; Atk. 37; 1 Burn, 272.) **110**

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Except in cases specified in certain enactments, a constable may not arrest a person, without warrant, merely on suspicion of his having committed a misdemeanour. But if a constable has reasonable cause to suspect that a person has committed a felony, or if one man makes a reasonable charge of felony against another and requires a constable to arrest him, the constable may detain him until he can be brought before a magistrate; and the constable will be secure, though it turned out that no felony was committed. (Ad. Torts, 150-2; Broom, Com. 828; 1 Burn, 273.) **111**

Where a constable may arrest without warrant.

A constable may ex officio arrest a person who in his presence is a breaker of the peace, or has committed or threatens to commit any other offence, and keep him until he can bring him before a magistrate. (Ad. Torts, 153; Broom, Com. 828; 1 Burn, 274.) But it has been held that an imprisonment cannot be justified on the ground that the plaintiff unlawfully entered the defendant's house, and made a great noise and disturbance therein (without the allegation of a breach of the peace), and would not depart when requested. (Ad. Torts, 155.) **112**

A constable who sees a person riding a bicycle at night without a proper light has no power to stop him for the purpose of ascertaining his name and address. (*Hatton v. Treeby*, (1897) 2 Q. B. 452.) **113**

As a general rule, a private person may not, without warrant, arrest another for a misdemeanour, except to prevent the continuance or the threatened renewal of a breach of the peace. (2 Rosc. 922; Ad. Torts, 153; Broom, Com. 824.) **114**

Where a private person may arrest without warrant,

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Any bystander is authorized, and indeed bound, to arrest an affrayer, and deliver him over to a peace officer, to be carried before a magistrate, in order that he may be compelled to find sureties for keeping the peace. But a private individual may not do this after the affray is over, unless the affrayers remain, and there is reasonable ground for apprehending a renewal of the disturbance. If the affrayers disperse, they may not be pursued, or given or taken into custody. (Ad. Torts, 153-4; Broom, Com. 824-5; Atk. 36; 1 Burn, 276.) **115**

Anyone is justified, and indeed bound, to arrest a person who in his presence has committed or attempted to commit a felony or inflicted a dangerous wound, or to prevent a person from committing a felony, or to assist an officer demanding his help for the taking of a felon or the suppression of an affray. (Broom, Com. 826; 1 Burn, 275.) **116**

A person found committing an offence against the Act relating to Malicious Injuries to Property, may be apprehended without a warrant, if taken in the very act, by any peace officer, or the occupier or landlord of the property injured, or his servant, or any person authorized by him, and taken before some neighbouring magistrate. (24 & 25 Vict. c. 97, s. 61; Ad. Torts, 156.) **117**

Anyone found committing an indictable offence between 9 p.m. and 6 a.m. may be apprehended by any private individual, and conveyed by him, or delivered to some peace officer to be conveyed before a magistrate. (Ad. Torts, 156; 14 & 15 Vict. c. 19, s. 11.) **118**

Any person disturbing Divine Service may be apprehended by a constable or churchwarden, and taken before a magistrate. (Ad. Torts, 156-7; 23 & 24 Vict. c. 32, ss. 2, 3; *Vallancey v. Fletcher*, (1897) 1 Q. B. 265.) **119**

Anyone found committing an offence on or with respect to property under the Metropolitan Police Act may be arrested by the owner of the property, or by his servant, or any person authorized by him, and may be detained until he can be delivered into the custody of a constable. But the offender must be arrested in the very act, and not afterwards, however recently. (2 Rose. 922; 2 & 3 Vict. c. 47, ss. 63, 66.) **120**

Anyone found committing an offence against the Larceny Consolidation Act may be apprehended by any person without warrant, and taken before a magistrate. And a person to whom property is offered to be sold, pawned, or delivered, if he has reasonable cause to suspect that any offence against the Act has been committed with respect to such property, may and ought to apprehend the party offering the same and take him before a magistrate. And in certain other cases, a pawnbroker may arrest a person, and hand him over to a policeman. (24 & 25 Vict. c. 96, s. 103; 35 & 36 Vict. c. 93, s. 34; Ad. Torts, 155-6; *Howard v. Clarke*, 20 Q. B. D. 558.) **121**

Powers of arrest are also given by the Vagrant Acts (5 Geo. IV. c. 83, &c.); the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 223); by Railway Acts (Ad. Torts, 158); by the Pawnbrokers Act (35 & 36 Vict. c. 93); and by the Prevention of Crimes Act (54 & 55 Vict. c. 69). **122**

Except in such special cases as these, in order to justify a private individual in causing the arrest of another without a warrant, he must prove the commission of a felony, and the existence of reasonable and probable cause for fairly suspecting that the plaintiff either committed it or was implicated in it. (Ad. Torts, 150-1; Broom, Com. 826; 1 Burn, 275; Atk. 36; *Perry-*

man v. Lister, L. R. 3 Ex. (Ex. Ch.) 197; and see 4 H. L. 521.) **123**

A private individual who, except in such special cases and without such legally sufficient grounds, directs a police officer to take a person into custody without a magistrate's warrant, thereby renders himself liable to an action for false imprisonment, in which, if it is successful, heavy damages are usually given. But when a person is arrested under a warrant, the person making the charge will be safe unless he acted maliciously and without reasonable and probable cause. (*Broom*, Com. 827-8; 1 *Burn*, 277; *Perryman v. Lister*, L. R. 3 Ex. (Ex. Ch.) 197.) **124**

The question of reasonable and probable cause is to be decided by the judge, as if it were a question of law, on facts found by the jury. (Ad. Torts, 222; *Lister v. Perryman*, L. R. 4 H. L. 521, 535, 538-9. And see *infra*, pars. 209-22.) **125**

A corporation is responsible for a wrongful imprisonment by one of its servants, if within the scope of his authority. (See Ad. Torts, 118.) **126**

How far a person is responsible for imprisonment or arrest by a judge, magistrate, or police officer.

A person is not responsible for orders or decrees of judges or justices before whom he has laid a complaint *bonâ fide*. But every private unofficial person, not acting in the authorized execution of legal process, is responsible in damages for a wrongful imprisonment ordered, directed, or authorized by him, or for a wrongful imprisonment ratified and adopted by him, though effected or ordered by his servant or agent, without his authority, but for his use or benefit. If, however, a man gives information *bonâ fide*, or makes a charge *bonâ fide* against another to a police constable, but leaves the constable to make inquiry into the circumstances, and act as he may think fit in the matter, he will not be respon-

sible. If a person signs the charge sheet, that is *prima facie* evidence that he ordered and directed the arrest, but the presumption arising from that act may be rebutted. (Ad. Torts, 147-8; 2 Rosc. 919. See remarks of Willes, J., in *Austin*, app., *Dowling*, resp., L. R. 5 C. P. 538-9.) **127**

Justices of the peace and constables are protected by general enactments that actions against them for any thing done in the execution of their office must be brought within six months of the act complained of. (11 & 12 Vict. c. 44, s. 8; 24 Geo. II. c. 44, s. 8.) A similar rule has now been made as to all acts done in execution or intended execution of statutory and other public duties or authorities. (Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61); Pol. Torts, 194; Ad. Torts, 724-6; 2 Rosc. 1201-3.) **128**

Protection to constables and others by enactment.

Where the plaintiff in any action in the Supreme Court in which, if brought before the commencement of the stat. 32 & 33 Vict. c. 62, the defendant would have been liable to arrest, proves at any time before final judgment by evidence on oath, to the satisfaction of a judge of such Court, that the plaintiff has good cause of action against the defendant to the amount of fifty pounds or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended, and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, such judge may in the prescribed manner order such defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. **129**

Arrest of a person about to leave England to avoid a demand.

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Where the action is for a penalty or sum in the nature of a penalty, other than a penalty in respect of any contract, it shall not be necessary to prove that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action, and the security given (instead of being that the defendant will not go out of England) shall be to the effect that any sum recovered against the defendant in the action shall be paid, or that the defendant shall be rendered to prison. (32 & 33 Vict. c. 62, s. 6.) **130**

Confining a
person of un-
sound mind.

Any individual is authorized to confine a person of unsound mind, who appears likely to do harm to himself or to any other person; but the legislature has established appropriate tribunals and forms of proceeding for ascertaining their exact mental condition and imposing the necessary restraint upon their actions under the supervision of public functionaries. (Ad. Torts, 161-2; Lunacy Act, 1890 (53 Vict. c. 5).) **131**

Arrest of
principal by
his bail.

A person who has given bail is always regarded as in the custody of his bail, who may take him and render him at any time, even while attending as a witness in a court of justice. They may take him on Sunday and keep him till the next day, and then render him. (Ad. Torts, 162.) **132**

Amount of
damages for
false im-
prisonment.

The Court never interferes with the discretion of the jury as to the amount of damages for an assault and false imprisonment, unless they are grossly excessive, or clearly founded on a mistaken or improper view of the matter. Any circumstances of aggravation on the one hand, and any circumstances of extenuation, not pleadable as a defence, on the other hand, ought to be taken into account, to increase or lessen the damages. (Ad. Torts, 162-4; Mayne, 119, 438.) **133**

CHAPTER III.

DEFAMATION.

ONE of the most precious rights concerning the person, is that of security to character and reputation. This may be injuriously affected by defamation, which is of two kinds, namely, libel and oral slander. (Ad. Torts, 165-7; 2 Rose. 855; Odgers, 1-7; Pol. Torts, 219.) **134**

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CHAP. III.

There is a material distinction between libel and slander. Libel is deemed a greater injury than slander, inasmuch as oral slander is sudden and fleeting, whereas libel is deliberate, permanent, and in general propagated farther. Hence, libel is always actionable without proof of special damage. A libel is punishable both criminally and by action. An action for libel can be brought at any time within six years, slander only within two years, of its publication. (Ad. Torts, 165.) **135**

Difference
between libel
and slander.

SECTION I.

Of Libel or Written Slander.

Libel is a slander in writing, or in print, or by pictorial or other representation. (Wharton; Ad. Torts, 167-8; Odgers, 18 *et seq.*; *Monson v. Tussauds, Limited*, (1894) 1 Q. B. 671.) **136**

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Libel defined.

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Publication.

A person libelled will not be entitled to an action, unless the libel be published. But parting with a libellous print or writing in order that it may become known, or the making a libel known to any third person, amounts to a publication. (Broom, Com. 858 ; Odgers, 170-2 ; Ad. Torts, 209-12.) **137**

An open message passed through the hands of a telegraph clerk (*Williamson v. Freer*, L. R. 9 C. P. 393), or a letter dictated by a principal and taken down in shorthand, and type-written by a clerk (*Pullman v. Hill & Co.*, (1891) 1 Q. B. 524), is a publication to those persons, if they are capable of understanding the matter so delivered to them. But if the occasion of a letter is privileged as regards the principal, publication to his clerk in the usual course of office business is privileged too. (*Boixius Frères v. Goblet*, (1894) 1 Q. B. 842 ; Pol. Torts, 230.) **138**

An accidental and unintentional communication of a libel to a third person amounts to a publication. (Odgers, 175-6 ; 2 Rose. 859 ; *Shepherd v. Whitaker*, L. R. 10 C. P. 502.) It was held that if the communication was privileged, the privilege was not lost by the sending of it by mistake to the wrong person (*Tompson v. Dashwood*, 11 Q. B. D. 43) ; but this decision is now overruled. (*Hebditch v. McIlwaine*, (1894) 2 Q. B. 54 ; Pol. Torts, 232 ; 2 Rose. 869.) **139**

Sending a defamatory letter to a wife about her husband is a publication. (*Wenman v. Ash*, 13 C. B. 836.) But communication by a husband to his wife is not. (*Wennhak v. Morgan*, 20 Q. B. D. 635.) **140**

Vendor of
newspaper.

The vendor of a newspaper is not liable for the publication of a libel contained therein if he can prove that he was not aware that the newspaper contained, or was likely to contain, libellous matter, and that his want of

knowledge was not due to negligence on his part.
(*Emmens v. Pottle*, 16 Q. B. D. 354.) **140a**

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SECT. I.

All written or printed publications which tend to prejudice the private character or credit of another, or to render a person ridiculous or contemptible, or to cause him to be hated, feared, or avoided, or to injure him in his business, are libellous; and an action for damages is maintainable against the writer and publisher, unless the publication is a privileged communication, or the libeller can prove the truth of the libel. (Odgers, 18-32; Ad. Torts, 167-8; Broom, Com. 844; 3 Ste. Com. 419; *Walker v. Brogden*, 19 C. B. (N. S.) 165.) **141**

What printed
or written
publications
are libellous.

Malice is the gist of an action for libel or slander. **Malice.**
The word malice may, however, be either used in the popular sense of ill-will, or in the legal general sense of an intention to do a wrongful act; and unless the injurious communication is privileged, the law implies malice in the legal general sense; and though evidence of malice may be given to increase the damages, it is never deemed necessary. In the case of what would otherwise be a privileged communication, actual malice in the popular sense must be proved, in order to support an action. (2 Rose. 863-4; Ad. Torts, 179, 205; Odgers, 306-35; *Spill v. Maule*, L. R. 4 Ex. (Ex. Ch.) 232; *Davies v. Snead*, L. R. 5 Q. B. 608; *Hart v. Gumpach*, L. R. 4 P. C. 439, 458-9; *Clark v. Molyneux*, 3 Q. B. D. 237, 246-7; *Jenoure v. Delmege*, (1891) A. C. 73; *Baker v. Carrick*, (1894) 1 Q. B. 838; *Nevill v. Fine Arts and General Insurance Co.*, (1897) A. C. 68.) **142**

Privileged communications are divisible into two classes, viz., those made upon occasions absolutely privileged, where the privilege is absolute, so that no actions

Privileged
communica-
tions.

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can be brought in respect of them, even although made falsely, knowingly, and maliciously, as official reports by military officers on military matters to their proper military superiors, and communications in military courts; statements by judges, advocates, and witnesses, in judicial proceedings; acts of state and official notifications; and communications made in parliament, and petitions to parliament; and those made upon occasions privileged in the absence of malice, where the privilege is destroyed by proof of malice in fact. (Odgers, 204-304; 2 Rose. 868-76.) **143**

Qualified
privilege

Where a communication is fairly made in the discharge of some legal or moral duty, or for the necessary protection or investigation of an interest, or upon some other reasonable occasion or exigency, without disbelief of its truth, and without actual malice or gross exaggeration, it is privileged if it is such as the occasion warrants, and made to a person who has a corresponding legal or moral duty in receiving it. (Ad. Torts, 183-205; Odgers, 204-5, 221-304; Broom, Com. 844-58; 2 Rose. 868-76; *Lawless v. Anglo-Egyptian Cotton Co.*, L. R. 4 Q. B. 262; *Spill v. Maule*, L. R. 4 Ex. (Ex. Ch.) 232; *Dawkins v. Lord F. Paulet*, L. R. 5 Q. B. 94; *Darvies v. Snead*, L. R. 5 Q. B. 608; *Hart v. Gumpack*, L. R. 4 P. C. 439, 458-9; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495; *Clark v. Molyneux*, 3 Q. B. D. 237; *Quartz Hill Gold Mining Co. v. Beall*, 20 Ch. D. 501; *Jenoure v. Delmege*, (1891) A. C. 73; *Stuart v. Bell*, (1891) 2 Q. B. 341; *Baker v. Carrick*, (1894) 1 Q. B. 838.) **144**

But a communication, which would be privileged if made by letter, becomes unprivileged if unnecessarily sent through the telegraph office, because it is communicated to the clerks through whose hands it passes.

(*Williamson v. Freer*, L. R. 9 C. P. 393. And see above, par. 138.) **145**

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What would otherwise be a privileged communication may be couched in language so much too strong for the occasion as to afford in itself evidence of actual malice, whereby the privilege is forfeited. But to submit the language of privileged communications to a strict scrutiny, and to hold all excess beyond the formal exigency of the occasion to be conclusive evidence of actual malice, or even sufficient evidence of actual malice to allow the plaintiff to have the question submitted to the jury, would greatly limit, if not altogether defeat, that protection which the law throws over privileged communications. It is sufficient for the purpose of privilege that the defendant may have honestly believed that everything which he said was true and needful for the exigency of the case, although, in fact some of his expressions exceeded what was necessary for it. (*Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495, 505, 508-9; *Hart v. Gumpach*, L. R. 4 P. C. 460; *Jenoure v. Delmege*, (1891) A. C. 73.) **146**

But it is essential, in the case of a communication privileged when not malicious, that the party making it should believe in its truth. If he knowingly makes a false charge there is malice, and consequently no privilege. If a person believes a communication to be untrue, he should, at the time of making it, state his belief of its untruth. (Ad. Torts, 184.) **147**

“Upon the question whether an alleged libel is a privileged communication or not, the proper course at a trial is this: the judge is bound to ask the jury whether the matter was published *bonâ fide*. If they come to the conclusion that it was, then it is for the judge to say whether, under all the circumstances, it is

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Letter as to
servant's
character.

or is not a privileged communication." (Lord Chelmsford, in *Stace v. Griffith*, L. R. 2 P. C. 423; *Davies v. Snead*, L. R. 5 Q. B. 608.) **148**

A letter in answer to inquiries about the character of a servant is privileged. (Odgers, 226; Pol. Torts, 246.) **149**

Letters by a
clergyman.

Defamatory letters written and published by a minister of religion, even though under the strongest sense of duty, are not privileged. (Ad. Torts, 188.) **150**

Absolute
privilege.

Instances of absolute privilege are given in pars. 152-7 below. Instances of qualified privilege in pars. 158 et seq. **151**

Official
reports of
military and
naval officers,
and communi-
cations in
military
courts.

Official reports by military and naval officers, in the course of their duty, to their proper superiors, and communications in proceedings in military courts, are absolutely privileged. (Odgers, 218-9; 2 Rose. 868; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744; *Dawkins v. Lord F. Paulet*, L. R. 5 Q. B. 94.) **152**

Defamatory
matter in the
course of
judicial pro-
ceedings.

Statements or depositions by judges, advocates, and witnesses in the course of judicial proceedings before courts of competent jurisdiction are absolutely privileged. But, if false, they may be made a ground of a prosecution for perjury. (2 Rose. 868-9; Ad. Torts, 182-3; Odgers, 210-5; *Dawkins v. Lord Rokeby*, L. R. 7 H. L. 744; *Seaman v. Netherclift*, 2 C. P. D. 53; *Munster v. Lamb*, 11 Q. B. D. 588; and see *Anderson v. Gorrie*, (1895) 1 Q. B. 668.) A licensing meeting of a county council is not a court for this purpose. (*Royal Aquarium Society v. Parkinson*, (1892) 1 Q. B. 431.) **153**

Acts of state
and official
notifications.

Acts of state, the official notifications of such acts in state papers, and communications as to matters of state by one minister to another, are absolutely privileged. (Odgers, 219; *Grant v. Secretary of State for India*, 2

C. P. D. 445; *Chatterton v. Secretary of State for India*, (1895) 2 Q. B. 189.) **154**

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Information printed merely for the use of members of Parliament is privileged, so far as its circulation is confined to them. (Ad. Torts, 199.) **155**

Information for members of Parliament.

A member of Parliament, when speaking in his place, may freely remark upon the character of others; but he will be responsible in damages if he prints and publishes speeches of a libellous nature. (Ad. Torts, 199; Odgers, 208; Broom, Com. 856; 2 Rose. 870.)

Speeches of members of Parliament.

156

Petitions to Parliament and to a Committee of either House are absolutely privileged; but their publication to persons not members of Parliament is not privileged. (Odgers, 207.) **157**

Petitions to Parliament.

Petitions and memorials to the proper authorities, complaining of the serious misconduct of magistrates and public officers, and officers of the army and navy, and containing statements honestly believed to be true, are privileged communications. (Ad. Torts, 187-8; 2 Rose. 870.) **158**

Petitions and memorials complaining of the conduct of public functionaries.

The charge of a bishop is a privileged communication as delivered; and it is also privileged as sent to a newspaper, if it be needful that it be generally circulated. (*Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495.) **159**

Charge of a bishop.

Letters imputing grave misconduct to clergymen, addressed to the bishop of the diocese, are privileged, if sent bonâ fide for the purpose of obtaining an inquiry into the matter by the bishop, where there is a fair and reasonable cause for resort to the bishop, but not if sent on frivolous grounds. (Ad. Torts, 190.) **160**

Letters to a bishop.

If a confidential communication is honestly made between relatives respecting the character of a person

Communications between friends.

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Report of a
secretary of
a society.

proposing marriage, or between relatives or friends, purely to prevent an injury, it is privileged. (Ad. Torts, 191-3.) **161**

The report of a secretary of a society for the purpose (inter alia) of investigating cases of applicants for charitable relief, although containing defamatory statements, addressed, in answer to inquiry, to a person interested in a case, is privileged, unless malice is shown. (*Waller v. Loch*, 7 Q. B. D. 619.) **162**

Report of
chief con-
stable.

A report of a chief constable as to licensed houses made at the request of the watch committee is privileged. (*Andrews v. Nott-Bower*, (1895) 1 Q. B. 888.)

163

Self-protec-
tion.

A warning given by a master to his servants not to associate with a former fellow-servant, whom he has discharged on the ground of dishonesty, is privileged. (*Somerville v. Hawkins*, 10 C. B. 583.) The privilege of an occasion of legitimate self-interest extends to a solicitor writing as an interested party's solicitor in the ordinary course of his duty. (*Baker v. Carrick*, (1894) 1 Q. B. 838; Pol. Torts, 247.) **164**

Reports of
legal pro-
ceedings.

"A fair account of what takes place in a court of justice is privileged." (See judgment in *Wason v. Walter*, L. R. 4 Q. B. 73, 87-8.) But a report of proceedings in a court of justice is not privileged, though it be true, if sent by a person who is not a reporter for a newspaper, and from a malicious motive. (Odgers, 286; *Stevens v. Sampson*, 5 Ex. D. 53; *Usill v. Hales*, 3 C. P. D. 319; *Macdougall v. Knight*, 14 App. Cas. 194; *Macdougall v. Knight*, 25 Q. B. D. 1; *Searles v. Scarlett*, (1892) 2 Q. B. 56; *Kimber v. Press Association*, (1893) 1 Q. B. 65.) **165**

In some instances, the reports of legal proceedings have been held to be actionable: as in the case of state-

ments of counsel unsupported by evidence ; or untrue, unfair, or exaggerated accounts, published after a trial is concluded ; or disparaging comments, allegations, and opinions of the reporter himself, or of any person other than one whose duty required him to make them ; or matters of a grossly scandalous, blasphemous, or indecent nature. (Odgers, 291-4 ; Ad. Torts, 197-8 ; Broom, Com. 854 ; 2 Rose. 874.) **166**

The privilege extends to fair reports of quasi-judicial proceedings of a body established for public purposes. (*Allbutt v. General Council of Medical Education*, 23 Q. B. D. 400.) **167**

A faithful report in a public newspaper of a debate in Parliament is not actionable ; nor are comments thereon in such newspaper, if made in an honest and fair spirit. (*Wason v. Walter*, L. R. 4 Q. B. 73.) **168**

Comments on
parliamentary
proceedings.

By the Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), a fair and accurate report in any newspaper, of proceedings publicly heard before any Court exercising judicial authority, is privileged if published contemporaneously with such proceedings ; but this does not authorize the publication of blasphemous or indecent matter (sect. 3). A fair and accurate report published in a newspaper of proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, or other local authority, or any meeting of Royal and Parliamentary Commissions and of Select Committees, is privileged unless it shall be proved that such report was made maliciously. The defendant must not have refused on request to insert in the same newspaper a reasonable contradiction or explanation. The publication of any matter not of public concern, and the publi-

Law of Libel
Amendment
Act, 1888.

cation of which is not for the public benefit, is not protected (sect. 4). **169**

A public meeting is for this purpose: "Any meeting bonâ fide and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted." **170**

Fair comment.

Everyone has a right to comment on matter of public interest and general concern, provided he does so fairly and with an honest purpose. Such comments are not libellous. (Odgers, 42.) This is a rule of common right and not of allowance to persons in any particular situation; and it is not correct to speak of utterances protected by it as privileged. (Pol. Torts, 236; *Merivale v. Carson*, 20 Q. B. D. at p. 282.) Thus fair and candid criticism, however severe, on a book, or a paper, or a work of art, or a handbill, or an entertainment, is allowable; but if the comment is malevolent, and exceeds the bounds of fair opinion, it is actionable. (Ad. Torts, 201-3; Broom, Com. 853; 2 Rose. 875.) **171**

And fair and bonâ fide comments upon persons attending a parliamentary election meeting may be made in a newspaper. (*Davis v. Duncan*, L. R. 9 C. P. 396.) **172**

Fair comments on the public acts of public men are allowable. But if comments on public men are made a medium for private malice, or exceed the bounds of fair criticism, as by falsely imputing improper motives, even in the belief of such motives having existed, they are actionable. (Ad. Torts, 203; Broom, Com. 852-3; 2 Rose. 876; *Campbell v. Spottiswoode*, 3 B. & S. 769; *Kelly v. Tintling*, L. R. 1 Q. B. 699; *Merivale v. Carson*, 20 Q. B. D. 275.) **173**

What acts and conduct are open to public comment

is a question for the Court. The matter may be in itself of interest to the common weal, as the conduct of persons in public offices or affairs, or of those in authority, whether imperial or local (*Pursell v. Souler*, 2 C. P. D. (Ap.) 215); or it may be laid open to the public by the voluntary act of the person concerned. **174**

If the defendant can show that the defamatory matter was true no action will lie against him; and in this case the purpose or motive with which it was published is immaterial. Such a defence, however, is a dangerous plea, for the strictest proof is required; and if it be not proved the defendant's persistence in the charge will tend to increase the damages given against him. (Odgers, 564.) A man cannot justify part of a statement and admit liability for part without distinctly severing that which he justifies from that which he does not. (*Fleming v. Dollar*, 23 Q. B. D. 388; see also as to the defence of justification: *Rassam v. Budge*, (1893) 1 Q. B. 571, 578; *Zierenberg v. Labouchere*, (1893) 2 Q. B. 183.) **175**

If a printer discovers that he is printing libellous matter, he ought at once to stop; and he may then, but not otherwise, recover his charges. (Odgers, 8.)

176

A person may be restrained by injunction from publishing libellous statements of another to the injury of his trade. (*Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763; *Hayward & Co. v. Hayward and Sons*, 34 Ch. D. 198; but see *White v. Mellin*, (1895) A. C. 163, 167.) **177**

For a falsehood in a newspaper about the plaintiff's business, not personally libellous and not defamatory in itself, it was held an action on the case would lie. Evident loss of business is sufficient to support such an

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action. (*Ratcliffe v. Evans*, (1892) 2 Q. B. 524; but see *White v. Mellin*, (1895) A. C. 163.) **178**

SECTION II.

Of Verbal Slander.

SECT. II.

Scandalum
magnatum.

By virtue of certain ancient statutes, certain words were actionable in the case of a peer, spiritual or temporal, or a great officer of state, which could not be deemed so in the case of an ordinary person. These statutes had become obsolete, and are all repealed by the Statute Law Revision Act, 1887. (Odgers, 94-5.) **179**

Words action-
able per se.

Spoken defamatory words are actionable whenever special damage has in fact resulted from their use; and where the imputation is on the face of it injurious the Court will presume damage. The Court will so presume in four cases:—(1) where the words charge the plaintiff with the commission of a crime, or (2) impute a contagious or infectious disease tending to exclude him from society, or (3) are spoken of him in the way of his office, profession, or trade, or (4) impute unchastity or adultery to any woman or girl. (Odgers, 59; *Ad. Torts*, 169-70; 2 *Rosc.* 855.) **180**

Imputation
of a crime.

Words which impute that the plaintiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage, but not if the offence imputed be only punishable by penalty or fine. It is actionable per se to falsely call a man a returned convict. (Odgers, 64.) **181**

The words must clearly impute a crime punishable

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with imprisonment. For an imputation of fraud or dishonesty merely, no action lies without proof of special damage. No action lies if the crime imputed be one of which the plaintiff could not by any possibility be guilty. (Odgers, 67-9.) **182**

To affirm that a person has a contagious disease, the imputation of which may exclude him from society, is actionable without proof of special damage. (Ad. Torts, 171; 3 Ste. Com. 415; Odgers, 70.) **183**

Imputation of a contagious disease.

Words spoken of a professional man or a tradesman, in reference to his profession or business, imputing misconduct or gross ignorance or incapacity, and calculated to injure him in it, and words disparaging a person in an office of public trust, are actionable without proof of any special damage. (Ad. Torts, 171-4; 2 Rosc. 855; 3 Ste. Com. 415-6; Odgers, 71-7.) **184**

Words injurious to a man in his profession or business.

Words directly tending to injure a clergyman in his profession, and to subject him to a loss of emolument, are actionable. (Ad. Torts, 173; Odgers, 80-2.) **185**

Words are actionable where they impute to a person holding some office or employment, some specific misconduct or unfitness in connection with such office or employment. If they amount only to a vague imputation of general misconduct or unfitness for his situation, they will fail to support an action without the proof of special damage. (Ad. Torts, 174; 2 Rosc. 855; Odgers, 77-80.) **186**

An action will lie without proof of special damage for words imputing dishonesty in a public office of trust, whether the office be one of profit or not. But when the words merely impute unfitness for an office, no action lies if the office be honorary, as in the case of a town councillor, though it will lie if the office be one of profit. (Odgers, 77-80; *Alexander v. Jenkins*, (1892)

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1 Q. B. 797; *Booth v. Arnold*, (1895) 1 Q. B. 571.)
187

Imputation of
unchastity to
a woman.

By the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), words spoken, after the passing of the Act, imputing unchastity or adultery to any woman or girl, shall not require special damage to render them actionable. But the plaintiff shall not recover more costs than damages unless the judge shall certify that there was reasonable ground for bringing the action. **188**

Words
actionable on
account of
some special
damage.

In cases other than the above four, words are not actionable without proof of special damage. The loss of the hospitality of friends is such a special damage. But illness is not to be deemed a natural and ordinary consequence of slanderous words so as to constitute such special damage. (3 Ste. Com. 416; Ad. Torts, 174-7; 2 Rose. 866; Odgers, 92-4; *Chamberlain v. Boyd*, 11 Q. B. D. 407.) **189**

Repetition of
a slander.

If any special damage has resulted, or is likely to have resulted, immediately and naturally from the utterance of slanderous words, an action for damages is then maintainable, even though the utterer was not the author of the scandal, but merely repeated what he had heard. But the original utterer of slanderous words is not responsible in damages for the subsequent repetition of them, except by persons who had an authority from him to repeat them, or were under an obligation to do so. (Ad. Torts, 177-8; 2 Rose. 866; *Dixon v. Smith*, 5 H. & N. 450; *Parkins v. Scott*, 1 H. & C. 153; *Watkin v. Hall*, L. R. 3 Q. B. 396.)

190

Malice in
ordinary
cases, and in
the case of
privileged
communica-
tions.

We have seen (pars. 143-168) that many communications of a defamatory nature are privileged, even when by way of libel. And, à fortiori, many such communications are privileged when they are merely

oral. But although the making of a charge may be justified by the occasion, yet it may be accompanied by such expressions, and may be made under such circumstances, as furnish proof of actual malice, in the popular sense, and in such case it will be actionable. (Ad. Torts, 185; *Davies v. Snead*, L. R. 5 Q. B. 608; *Clark v. Molynceux*, 3 Q. B. D. 237, 246-7.) **191**

In ordinary actions for slander, malice, that is, malice in the legal sense, is (in the absence of evidence to the contrary) presumed from the publishing the slanderous matter. But in the case of what would otherwise be privileged communications, actual malice must be proved in order to render them actionable. If the words spoken are absolutely privileged (as in pars. 194-7 below), they are not actionable even though uttered with express malice. (Ad. Torts, 205; 2 Rose. 863; *Davies v. Snead*, L. R. 5 Q. B. 608; *Hart v. Gumpach*, L. R. 4 P. C. 439, 458-9; *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 495.) **192**

The privilege attaching to the statements of a member of a board of guardians, made at a meeting of the board, relative to a person who had been a servant of the board, is not destroyed by the presence of reporters. (*Pittard v. Oliver*, (1891) 1 Q. B. 474.) **193**

Counsel or solicitors when acting as advocates are not liable for defamatory words spoken as advocates in the course of any judicial proceedings, even though they were unnecessary, irrelevant, without justification, and arise from personal ill-will towards the person defamed. (Ad. Torts, 181-2; 2 Rose. 869; *Munster v. Lamb*, 11 Q. B. D. 588.) **194**

Liberty of
advocates.

Judges, magistrates, coroners and presidents of courts-martial, are not responsible for defamatory expressions uttered by them, with reference to a cause or matter in

Liberty of
judges,
magistrates,
coroners,
counsel, wit-

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nesses, and
parties.

issue before them, although spoken maliciously and without reasonable cause. (Ad. Torts, 182; 2 Rosc. 868-9; *Scott v. Stansfield*, L. R. 3 Ex. 220; *Dawkins v. Lord Rokeby*, L. R. 8 Q. B. (Ex. Ch.) 255, 263; affirmed, 7 H. L. 744; and see *Royal Aquarium Co. v. Parkinson*, (1892) 1 Q. B. 431.) **195**

A witness in the box is absolutely privileged in answering all the questions asked him, and even if he volunteers a statement he will be privileged if it has reference to the matter in issue, or arises out of any question asked him by counsel, though only going to his credit. (*Seaman v. Netherclift*, 2 C. P. D. 53.) But a statement made by a witness wholly irrelevant, uncalled for and malicious would not be privileged. And if a witness uses defamatory expressions before he has got into the witness-box, or after he has left it, he would be liable to an action for slander. **196**

Statements made by a witness before a Committee of the House of Commons are absolutely privileged. (*Goffin v. Donnelly*, 6 Q. B. D. 307.) **197**

Where the
circumstances
rebut pre-
sumption of
malice.

A person may be responsible for a slanderous imputation, though made in the belief of its truth, in answer to an inquiry (*Force v. Warren*, 15 C. B. (N. S.) 806), but words of mere suspicion, opinion, inquiry, advice, warning, or real regret will not create any cause of action, if the circumstances rebut the presumption of malice. (3 Ste. Com. 417; 2 Rosc. 868, 870-2.) **198**

In a recent case a host informed his guest of a charge of theft which had been brought against the latter's valet, who was stopping with him in the house. The valet was dismissed in consequence, and sued the host for slander. It was held the occasion was one of qualified privilege. (*Stuart v. Bell*, (1891) 2 Q. B. 341.) **198a**

And where the charge is true, that, if pleaded, will prevent the plaintiff recovering damages, because the law will not give a man damages in respect of an injury to a character which he either does not possess or ought not to possess. (Ad. Torts, 212.) **199**

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SECT. II.

Truth of the charge.

SECTION III.

General Observations.

In actions for defamation, words are now construed according to their proper meaning ; and that meaning, and not the meaning of the person uttering them, is the test of their being actionable. But in some cases, although the words may not be clearly defamatory, evidence may be given of facts which, under the particular circumstances, make them so. The onus will lie upon the plaintiff, who in his statement of claim annexes an "innuendo" to the words complained of, to establish clearly by evidence this secondary and defamatory meaning. (Broom, Com. 860-1 ; *Capital and Counties Bank v. Henty*, 7 App. Cas. 741 ; *Nevill v. Fine Arts and General Insurance Co.*, (1897) A. C. 68 ; and see *Monson v. Tussauds, Ltd.*, (1894) 1 Q. B. 671.) It is the duty of the judge to say whether the publication is capable of the meaning ascribed to it ; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has that meaning or not. (Ad. Torts, 206-9 ; Odgers, 100-44.)

SECT. III.

Interpretation of slanderous expressions.

200

The jury may give damages not only in respect of any loss arising from the libel, but also for the mental

Damages for libel.

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Setting up
libel by
plaintiff.

suffering caused to the person libelled. And any damages may be given which are not manifestly outrageous. (Ad. Torts, 214.) **201**

One libel cannot be set up against another as a defence; nor can it be set off in reduction of damages, unless the libel by the plaintiff may be regarded as the provoking cause of the libel by the defendant. (Ad. Torts, 216; Odgers, 253, 363-4.) **202**

Apology.

By 6 & 7 Vict. c. 96, s. 1, it is enacted that in any action for defamation it shall be lawful for the defendant (after notice in writing to the plaintiff of his intention so to do) to give in evidence, in mitigation of damages, that he made or offered an apology to the defendant for such defamation before the commencement of the action, or as soon after as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology; and by sect. 2 of the same Act, in any action against a newspaper or periodical for damages, it is enacted that the defendant can plead that such libel was inserted without actual malice or gross negligence, and that before the commencement of the action, or at the earliest opportunity after, he inserted a full apology in such newspaper or periodical, or, if such newspaper or periodical is ordinarily published at intervals exceeding a week, that he has offered to publish the said apology in any newspaper or other periodical to be selected by the plaintiff. Money must be paid into Court by way of amends at the time any plea under sect. 2 is delivered, or it will be treated as a nullity. (See 8 & 9 Vict. c. 75; *Dunn v. Devon, &c., Newspaper Co.*, (1895) 1 Q. B. 211.) **203**

But wholly apart from these sections, a defendant may give evidence of any apology or other amends in

mitigation of damages. (Ad. Torts, 213-4, 217; 3 Ste. Com. 421; Odgers, 370; 2 Rose. 880.) **204**

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The Libel Law Amendment Act, 1888 (51 & 52 Vict. c. 64, s. 6) provides that, in an action against a newspaper for libel, the defendant may prove, in mitigation of damages, that the plaintiff has already recovered, or brought actions for, damages, or has received, or agreed to receive, compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought. **205**

Evidence of previous actions for same libel.

The judge usually gives a definition of libel, and then leaves it to the jury to say whether the facts necessary to constitute the offence so defined are proved. And the judge may, if he thinks fit, give his own opinion, as a matter of advice to the jury. (Ad. Torts, 208-9; Odgers, 101-2; 2 Rose. 857.) **206**

Usual course in actions for libel.

In actions for slander, the judge usually decides whether the words are actionable per se, and whether the special damage assigned is too remote, and leaves it to the jury to say what is the construction of the words. (Odgers, 103.) **207**

In actions for slander.

Whether the communication is or is not privileged by reason of the occasion is a question for the judge alone when there is no dispute as to the circumstances under which it was made. If there be any doubt as to these circumstances, the jury must find what the circumstances, in fact, were; and on their findings the judge decides whether the occasion is privileged or not. **208**

CHAPTER IV.

MALICIOUS PROSECUTION.

PART I.
TIT. II.
CHAP. IV.

Action for
malicious
prosecution or
malicious
arrest, and
abuse of civil
process.

A PERSON is liable to an action if he puts the criminal law in motion before a Court or a judicial officer, or causes a search warrant to issue, or an action to be brought in the name of a third person, a pauper or insolvent who could pay no costs, or an execution for an excessive amount, or if he causes the arrest of a person under stat. 32 & 33 Vict. c. 62, s. 6, maliciously and without reasonable or probable cause for such a proceeding. **209**

In an action for malicious prosecution the plaintiff must prove (1) the prosecution; (2) determination in his favour; (3) that the defendant was the prosecutor; (4) defendant's want of reasonable and probable cause; (5) malice on the part of the defendant; (6) damage suffered. (2 Rose. 882; Pol. Torts, 288; *Abrath v. North Eastern Rail. Co.*, 11 Q. B. D. 440, affirmed 11 App. Cas. 247.) **210**

A corporation has been held to be liable to an action for malicious prosecution (*Edwards v. Midland Rail. Co.*, 6 Q. B. D. 287; *Rayson v. South London Tramways Co.*, (1893) 2 Q. B. 204; but see contra judgment of Lord Bramwell in *Abrath v. N. E. Rail. Co.*, L. R. 11 App. Cas. 250), and is also liable to actions for malicious arrest and abuse of civil process. (2 Rose. 884, 1155-6.) **211**

Malice may be either express or actual, or be only implied or constructive. For malice is not confined to

spite. It includes any motive other than that of simply bringing an offender to justice. **212**

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CHAP. IV.

Malice must be combined with want of reasonable and probable cause. Neither will suffice without the other; so that if a man is actuated by the most flagrant malice, yet if there was reasonable and probable cause for the prosecution, he will be entitled to judgment in such an action. Want of reasonable and probable cause cannot be implied from the most express malice. But malice (in the technical sense of an intention to do a wrongful act) is ordinarily implied from the absence of reasonable and probable cause; and even if there was such cause, yet if the defendant did not know it, or did not believe that the plaintiff was guilty, malice may be inferred. (Ad. Torts, 219, 225-6; Broom, Com. 835-41; 2 Rose. 884-7; *Hicks v. Faulkner*, 8 Q. B. D. 167, 175; *Brown v. Hawkes*, (1891) 2 Q. B. 718.) **213**

If a defendant maliciously, and without reasonable and probable cause, has made statements before a magistrate, in order to induce, and has induced him, to issue a warrant for the apprehension of the plaintiff, the defendant is responsible. (Ad. Torts, 221.) **214**

The facts (such as the conduct, belief, and motives of the parties) must be left to the jury (if there is one): but whether the facts found constitute reasonable and probable cause, must be determined by the judge, and not by the jury. (*Lister v. Perryman*, L. R. 4 H. L. 521, 538-9; *Hicks v. Faulkner*, 8 Q. B. D. 167, 172, 175; *Abrath v. N. E. Rail. Co.*, 11 Q. B. D. 440; 11 App. Cas. 247; Ad. Torts, 222-3; 2 Rose. 885; and see par. 125 above.) **215**

“The onus of showing that there was not reasonable and probable cause, rests, in the first instance, on the plaintiff. It is no doubt a negative, but it is a negative

essential to the plaintiff's case; and the defendant is entitled to the benefit of the plaintiff's failure to establish that negative." (Lord Colonsay, in *Lister v. Perryman*, L. R. 4 H. L. 542; see also *Hicks v. Faulkner*, 8 Q. B. D. 167; and *Abrath v. N. E. Rail. Co.*, 11 Q. B. D. (Ap.) 440; 11 App. Cas. 247.) **216**

There is this distinction between an action for malicious prosecution and an action for false imprisonment. In the former, the plaintiff must prove the non-existence of reasonable and probable cause, while in the latter, the onus lies on the defendant of proving its existence, as his justification. (*Hicks v. Faulkner*, 8 Q. B. D. 167, 170.) **217**

As to reasonable and probable cause grounded on hearsay evidence, it may perhaps be accurately laid down thus: that a person may have reasonable and probable cause, though he may have proceeded on hearsay evidence of another, if such other person appeared trustworthy, and if such hearsay evidence be a reasonable amount of credible information stated to have been given to such other person by a third person who appeared trustworthy, and to be speaking as to his own knowledge. (See remarks in *Lister v. Perryman*, L. R. 4 H. L. 521; and *Hicks v. Faulkner*, 8 Q. B. D. 167, 173.) **218**

An abandonment of the prosecution, or an acquittal for want of evidence, is not of itself any proof of malice or of the want of reasonable or probable cause. (Ad. Torts, 220-6; 2 Rose. 885.) **219**

If the plaintiff was convicted, he cannot obtain judgment, even though there was by law no appeal against the conviction. Indeed, in order to recover damages for a malicious prosecution or arrest, the plaintiff must show that the proceeding was determined in his favour,

though he may not have been actually acquitted, and that he suffered in person, in reputation, or in point of expense. (Ad. Torts, 229-30; 2 Rose. 883; Mayne, 447-8.) **220**

In the same case there may be both wrongful imprisonment and malicious prosecution, or either may exist without the other. When they both exist, an action may be brought in respect of them. Wrongful imprisonment begins when the party is in custody of a ministerial officer, until he is brought before a Court or a judicial officer. Malicious prosecution begins when he is brought before a Court or judicial officer. (*Austin*, app., *Dowling*, resp., L. R. 5 C. P. 534; Ad. Torts, 220.) **221**

Generally speaking, it is not an actionable wrong to institute civil proceedings without reasonable and probable cause, even if malice be proved, but a person who takes proceedings in bankruptcy against another, maliciously and without reasonable or probable cause, and knowingly and wilfully or recklessly swears to depositions false in fact, is liable to an action for a malicious prosecution, but the proceedings must be superseded or set aside before the commencement of the action: and an action for malicious prosecution will lie against a person for falsely and maliciously and without reasonable or probable cause presenting a petition to wind up a trading company under the Companies Acts, 1862 and 1867, even although no pecuniary loss or special damage to the company can be proved, as the presentation of the petition is calculated to injure the credit of the company. (Ad. Torts, 233-4; 2 Rose. 888-9; see *Quartz Hill Gold Mining Co. v. Eyre*, 11 Q. B. D. 674.)

CHAPTER V.

DECEIT.

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CHAP. V.

Definition.

THE wrong called deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. (Pol. Torts, 256.) A false statement may be the inducement for a contract, or may be part of a contract, and give rise to a claim for rescission of the contract or for compensation; but a false statement in certain cases is also a ground for an action in tort. (Pol. Torts, 257; Broom, Com. 780.) **223**

Conditions of
the right of
action.

In order to succeed in an action for deceit the plaintiff must show (1) that the defendant or his agent made a statement which was untrue in fact; (2) that the person making the statement knew it to be untrue, or made it in reckless ignorance of its truth or falsity (*Derry v. Peck*, 14 App. Cas. 337; *Le Lievre v. Gould*, (1893) 1 Q. B. 491); (3) that the statement was made with the intent that the plaintiff should act on it (*Langridge v. Levy*, 2 M. & W. 519; 4 M. & W. 338; *Polhill v. Walter*, 3 B. & Ad. 114; *Peck v. Gurney*, L. R. 6 H. L. 377; *Andrews v. Mockford*, (1896) 1 Q. B. 372); (4) that the plaintiff did so act upon it and thereby suffered damage. (*Horsfall v. Thomas*, 1 H. & C. 90.) But once a culpable misrepresentation is proved it will be for the defendant to show that the plaintiff did not rely upon it. (Pol. Torts, 260, 277.) **224**

There is no cause of action without both fraud and actual damage; even the grossest carelessness, in the

absence of contract, will not make a man liable for a false statement, unless it can be shown that he knew it to be false or was recklessly ignorant whether it was true or false. (Pol. Torts, 266; *Angus v. Clifford*, (1891) 2 Ch. 440.) **225**

But a man may be liable, on the ground of estoppel, for ignorantly making a false statement as to a matter on which it was his duty to be correctly informed. (*Burrowes v. Lock*, 10 Ves. 470; *Lou v. Bouverie*, (1891) 3 Ch. 82.) **226**

In a recent case, the defendant by way of practical joke falsely represented to the plaintiff, a married woman, that her husband had met with an accident whereby he had broken his legs, intending the plaintiff to believe the statement. The plaintiff did believe it, and suffered a nervous shock which rendered her ill for some time. It was held there was a good cause of action. (*Wilkinson v. Downton*, (1897) 2 Q. B. 57.) **227**

In consequence of the decision in *Derry v. Peek* (14 App. Cas. 337), in which it was held that a director was not liable for a false statement in the prospectus of a company which he honestly believed to be true, although he had no reasonable grounds for such belief, the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), was passed. It enacts that where a prospectus invites persons to subscribe for shares or debentures, every person who is a director of the company at the time of the issue of such prospectus, and every person named therein as a director of the company, and every promoter of the company, and other person responsible for the issue of the prospectus, shall be liable to pay compensation to all persons, who shall subscribe for any shares or debentures on the faith of such prospectus, for the loss they may have sustained by reason of any untrue statement in the pro-

Directors'
Liability
Act, 1890.

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Representa-
tions as to
credit.

spectus, unless it is proved that they had reasonable grounds for believing in such statement. **228**

No action can be brought to charge any person, by reason of any representation or assurance as to the character, conduct, credit, ability, trade or dealing of any other person, that he may obtain credit, money, or goods, unless it is in writing, signed by the party to be charged therewith, and not by his agent. (2 Rose. 854; Chit. Con. 587; 9 Geo. IV. c. 14, s. 6; *Swift v. Jewsbury*, L. R. 9 Q. B. (Ex. Ch.) 301.) It would seem that only statements going to an assurance of personal credit are within the statute. (Pol. Torts, 279.) **229**

Misrepresen-
tations by
agents.

A principal is liable for false representations made by his agent, if the principal knew the representation to be false and authorized the making of it; or the principal knew it to be false and the agent made it in the general course of his employment; or the agent knew it to be false and made it in the course of his employment, although the principal did not expressly authorize the representation and did not know it to be untrue. (Pol. Torts, 280-2; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. (Ex. Ch.) 259.) **230**

CHAPTER VI.

MALICIOUS INTERFERENCE WITH ANOTHER
GENERALLY.

A PERSON has a right of action against anyone who can be shown to be maliciously and wrongfully interfering with his trade or occupation. Mere competition carried on for the purpose of gain, not out of actual malice, and not by unlawful means, such as intimidation, is not actionable, even though it be intended to, and does in fact, drive a rival trader out of the field. (*Mogul Steamship Co. v. McGregor*, (1892) A. C. 25.) But an action will lie for maliciously procuring a third person to break his contract with the plaintiff, thereby causing damage to the plaintiff. (*Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333; *Temperton v. Russell*, (1893) 1 Q. B. 715.) **231**

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Malicious
interference
with a
person's
occupation.

Malice by itself, however, is not actionable. Thus, in a recent case, certain boilermakers engaged in common employment objected to work with the shipwrights on the ground that they had previously been engaged in ironwork. Allen, a delegate from the Boilermakers' Union, informed the employer that if the shipwrights were not dismissed the boilermakers would be called out. The employer thereupon dismissed the shipwrights, who sued Allen for loss of service. The House of Lords held that Allen had not committed an actionable wrong. There was here no breach of contract or other act of unlawfulness on the part of the employer, and it is not illegal, without using improper means, to persuade a man to do an act which is itself lawful. (*Allen v. Flood*, 32 L. J. 619.) **232**

Malice per
se not
actionable.

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TIT. II.
CHAP. VI.

In cases where an action lies for malicious interference it is sufficient to prove facts from which it may be inferred damage must result to the plaintiff from defendant's wrongful acts without proving specific damage. (*Exchange Telegraph Co. v. Gregory*, (1896) 1 Q. B. 147; *Broom, Com.*, 93.) **233**

Slander of
title.

Slander of title signifies a statement of something tending to cut down the extent of title to some estate vested in the plaintiff, e.g., where a person is about to sell property and another falsely alleges a defect in the title thereto. This is actionable only when it is false and malicious. The special damage required to support this kind of action is actual damage, but not necessarily damage proved with certainty in every particular; thus damage such as is the natural consequence of the false statement may be special enough though the connection be not specifically proved. (*Broom, Com.*, 864; *Pol. Torts*, 284; *Ratcliffe v. Evans*, (1892) 2 Q. B. 524.) Such an action may be brought for slander of title as to land or chattels. An action in the nature of slander for title lies for damage caused by wilfully false statements tending to damage the plaintiff's business. (*Ratcliffe v. Evans*, (1892) 2 Q. B. 524.) But it is questionable whether an action will lie in any case for disparaging a trader's goods merely by stating that some other trader's goods are better. (*Mellin v. White*, (1895) A. C. 154.) **234**

Maintenance.

If a person maintains or aids a party in litigation, without either interest in the suit, or lawful cause of kindred, affection, or charity in aiding him, he is liable for any damages caused by his acts. (*Pol. Torts*, 298; *Ad. Torts*, 29-30; *Bradlaugh v. Newdegate*, 11 Q. B. D. 1; *Harris v. Brisco*, 17 Q. B. D. 504; *Alabaster v. Harness*, (1895) 1 Q. B. 339.) **235**

CHAPTER VII.

INJURIES TO DOMESTIC RIGHTS.

A PERSON who knowingly induces a servant to leave his master's service, or keeps him as servant after he has quitted his place, and before the expiration of the stipulated period of service, is liable to an action. (Ad. Torts, 585; Broom, Com. 970; *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333.) **236**

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CHAP. VII.

Enticing
away a
servant.

A master may sue for the seduction of, or any personal injury to, his servant, if he thereby loses the servant's services (Broom, Com. 969); but he cannot so sue if the injury produces immediate death. (*Osborn v. Gillett*, L. R. 8 Ex. 88.) **237**

Action for
injury to a
servant.

A father is entitled to the custody and control of his legitimate children until the age of twenty-one years; and he may correct them, while under age, in a reasonable manner; and may delegate his authority to their tutor or schoolmaster. (2 Ste. Com. 297; Ad. Torts, 597.) **238**

The father's
power over
his children.

The mother has no legal power over her child in the father's lifetime, at least as against the father, unless delivered into her custody by the Court. But after the father's death she is entitled to the guardianship of the child during minority, alone, or jointly with any guardian appointed by the father. The mother can also appoint a guardian by will. (49 & 50 Vict. c. 27; 2 Ste. Com. 299; Simpson, 120, 126-9.) **239**

The mother's
power over
her children.

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CHAP. VII.

Removal of
father.

The Court can, in certain cases, remove a father from the guardianship of his child, and commit to some other fit person the custody of such child: *e.g.*, under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 12; Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), s. 7; Custody of Children Act, 1891 (54 & 55 Vict. c. 3); Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), ss. 6, 7. (*Smart v. Smart*, (1892) A. C. 425.) **240**

Action by
parents.

A parent cannot bring an action for injury done to his child, though the parent may have been put to expense in getting the child cured, unless the child is old enough to render him some sort of service, however slight, and can be treated in law as his servant at the time (1). (Ad. Torts, 585; 3 Ste. Com. 483; *Thompson v. Ross*, 5 H. & N. 16; *Hedges v. Tapp*, L. R. 7 Ex. 283.) **241**

Indeed, a parent has no remedy for the seduction of his daughter, even though he may have been put to great expense in consequence of it, unless the child was living with him, or he had a right to her services, at the time, and by reason of her pregnancy and illness he was deprived of those services to which he had a right. If he had a right to her services, however slight, and without proof of any having been rendered or been likely to be required, an action for damages is maintainable by the parent against the seducer^(a), where the pregnancy was caused by him, and the parent was not the indirect cause of the seduction, by introducing her to profligate acquaintances or encouraging improper

(a) The injustice of the cases where relief has been withheld from the parent is only equalled by the absurdity of the ground on which, in other cases, relief has been given to him. But the former has given rise to the latter.

intimacies. (Ad. Torts, 587; 3 Ste. Com. 483-4; 2 Rose. 909-12; *Terry v. Hutchinson*, L. R. 3 Q. B. 599.)

242

In estimating, however, the damages to be given for a daughter's seduction, the jury may give the father damages for the disgrace, distress and anxiety of mind which he has sustained. (3 Ste. Com. 484; Mayne, 487; 2 Rose. 911; *Terry v. Hutchinson*, L. R. 3 Q. B. 599.) **243**

At one time it was thought that the husband had very considerable rights over the liberty of his wife; but it has recently been decided that even where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce the restitution of conjugal rights. (*R. v. Jackson* (1891), 1 Q. B. 671; Ad. Torts, 592-3.) Every person who receives a married woman into his house, and suffers her to continue there after he has received notice from the husband not to harbour her, is liable to an action, unless the husband has by his cruelty or misconduct forfeited his marital rights. (Ad. Torts, 593.) Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. Such actions are now abolished by 20 & 21 Vict. c. 85, but the Act provides that damages can be claimed in a petition for dissolution of marriage, or for judicial separation, or by petition only, against any person on the ground of his having committed adultery with the wife of such petitioner (Ad. Torts, 594.) **244**

Injuries to
the rights of
a husband.

TITLE III.

Injuries to Property.

CHAPTER I.

OF INJURIES TO REAL PROPERTY.

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CHAP. I.

THE injuries to real property are principally six :
1. Ouster ; 2. Trespass ; 3. Nuisance ; 4. Waste ;
5. Subtraction ; 6. Disturbance. **245**

I. *Of Ouster.*

Ouster, how
effected.

1. Ouster is the deprivation of the possession. Ouster of the freehold is effected by abatement, intrusion, disseisin, or deforcement. (3 Ste. Com. 425-8.) Abatement is a wrongful entry by a stranger, on the death of the owner of the inheritance. Intrusion is a wrongful entry by a stranger, on the determination of a particular estate of freehold, before the remainderman or reversioner enters, or a wrongful entry on the demesnes of the Crown, and taking the profits thereof. Disseisin is a wrongful putting out of a person seised of the freehold in actual possession. Deforcement is a detainer of the freehold from the person entitled, in other cases. (Sm. Law of Prop. 6th ed. pars. 1460-74.) **246**

Ouster of chattels real is effected by turning out the legal proprietor of an estate held by statute, recognizance, or elegit, before the determination of his estate, by the raising of the sum for which the estate was given

him in pledge, or by ejecting a tenant of land from the occupation of it, during the continuance of his tenancy. (3 Ste. Com. 428.) **247**

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II. *Of Trespass.*

In a wide sense, a trespass is an injurious act, not amounting to treason or felony. (Wharton.) **248**

Definition of
a trespass.

But a trespass on land, in the generic sense of the term land, is an unwarrantable entry on it, or an unwarrantable use of it, either personally or by one's servants or cattle. (3 Ste. Com. 441; 1 Rose. 927.)

No actual damage need be shown; thus, the throwing a heap of stones, or pouring water out of a pail, or planting posts or rails, on another's land, and even the mere walking upon it, without damage to the soil or grass, is a trespass. (Ad. Torts, 360-1.) When a footpath is dedicated to the public, it has been held that there is a reservation of the right to plough it up! (*Arnold v. Blaker*, L. R. 6 Q. B. (Ex. Ch.) 433); and that if it becomes impassable after being ploughed up, the public have no right to pass over the adjoining part of the field! (*Arnold v. Holbrook*, L. R. 8 Q. B. 96.)

Instances of
trespass.

249

Loitering on a highway, for the purpose of annoying the owner of the soil in his lawful use of the adjacent land, may be a trespass against that owner. (*Harrison v. Duke of Rutland*, (1893) 1 Q. B. 142.) **250**

If a man's cattle, sheep, poultry, or any animals in which the law gives him a valuable property, trespass upon another's close, the owner of the animal is responsible for the trespass, apart from any question of negligence, unless he can show that his neighbour was bound to fence, and has failed to do so. (Ad. Torts, 128.) A man is not liable for trespass of his dog unless the dog

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is of a mischievous disposition, and this is known to the master. (See, however, pars. 338-9, below.) **251**

An owner or occupier of land may seize animals and chattels injuring or trespassing upon his land, and detain them until a fair compensation for the injury is tendered to him, unless they are under the personal care and the immediate control of someone. But he must distrain them at the time, and before they leave his land. (Ad. Torts, 399-402; 3 Ste. Com. 270; Gilbert, 24; *Boden v. Roscoe*, (1894) 1 Q. B. 608.) **252**

Actual or constructive possession, without proof of any title to the soil and freehold, is sufficient to support an action against a trespasser. Very slight evidence of possession is sufficient to establish a *primâ facie* right to sue. (Ad. Torts, 404-5.) **253**

If cattle driven along a street without negligence stray into a shop, the owner is not liable. (*Tillett v. Ward*, 10 Q. B. D. 17.) So, if being driven along a highway, they stray on to adjoining land through defect of fences, and are removed with reasonable alacrity. (*Goodwin v. Chereley*, 28 L. J. (Ex.) 298.) **254**

Action by
tenant and
reversioner
for injury to
buildings,

If buildings are tortiously and permanently injured by a third person, the tenant may sue in respect of the injury in an occupation point of view, and the reversioner in respect of the diminution in the saleable value of the property. (Ad. Torts, 407.) **255**

and for
injuries to
trees.

Where trees are injured, damages are recoverable by the occupier and by the reversioner—damages for the loss of shade, shelter, and fruit, by the former; damages for the loss of the timber, by the latter. **256**

Continuing
trespass.

For a continuous obstruction on land, a fresh action of trespass may be brought *de die in diem*, and recovery in a former action is no defence; and damages in

respect of a continuing cause of action are assessed down to the time of assessment. (2 Rose. 937; Ad. Torts, 361-2.) **257**

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A mere trespasser may be ejected, and if necessary, by force; unless he is permitted to remain without effort to remove him; in which case he will gain a possession. (Ad. Torts, 140-2; see supra, par. 100.) **258**

Expelling a trespasser.

In actions for trespass, the jury are not limited to the actual injury inflicted, and may take any circumstances of aggravation into account. Thus, substantial damages may be recovered against a wilful intruder into a dwelling-house, though no actual injury has been done either to person or property. (Ad. Torts, 386; Mayne, 438; 2 Rose. 937.) **259**

Damages for trespass.

A trespass may be justified on the ground that it was committed in the exercise of some legal or personal authority or right, or excused as having been done in self-defence, or in defence of the possession of a man's goods and chattels or cattle, or as an act of charity preserving the occupier from irremediable loss, or sometimes by the public safety and convenience, as in putting out fires. (Ad. Torts, 380; Pol. Torts, 351.) **260**

Justification of trespass.

When a person enters upon land under an authority *in law*, and exceeds that authority by doing what he had no right to do, or by remaining longer than he had a right to remain, he becomes a trespasser *ab initio*, and is in the position of a perfect stranger acting without excuse or justification. (2 Rose. 936; Ad. Torts, 361.) But a mere non-feasance will not be such an excess of authority, nor does the subsequent abuse of an authority in fact, (as a licence), make a trespass *ab initio*. (*The Six Carpenters' Case*, 1 Sm. L. C. 127—where six carpenters entered an inn, ordered wine, and refused to pay.) A right of distress being an authority given by

Trespass *ab initio*.

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law, if there were any irregularity in making or treating the distress, the landlord was at common law liable as a trespasser *ab initio*. But since 11 Geo. II. c. 19, s. 19, if rent is justly due, the landlord is not a trespasser *ab initio* in the case of an irregularity. In the case of an illegal distress, however, the statute affords no defence, and the distrainer is a trespasser *ab initio*. (2 Rosc. 936.) **260a**

Trespass on
lands abroad.

An action will not lie in England for trespass to lands situate abroad. (*British South Africa Co. v. Companhia de Moçambique*, (1893) A. C. 602.) **261**

III. *Of Nuisance.*

Nuisance, as an injury to real property, is dealt with under the general head of Nuisance, in Title IV., Chap. I. **262**

IV. *Of Waste (a).*

Definition.

Voluntary
waste.

Permissive
waste.

Different
kinds of
voluntary
waste.

Waste is that which tends to the permanent depreciation of the value of the inheritance. It is either voluntary, which is an offence of commission, as by pulling down a house: or it is permissive, which is an offence of omission only, as by suffering it to fall for want of necessary repairs. (Co. Litt. 53a; 2 Bl. Com. 281; Burton, § 718.) **263**

Voluntary waste chiefly consists in these things:—
1. Felling or destroying trees. 2. Destroying or injuring buildings. 3. Opening mines or pits. 4. Altering the property. 5. Destroying heirlooms. (1 Cru. T. 3, c. 2, § 1.) 6. Destroying certain kinds of living creatures which are regarded as part of the inheritance. **264**

(a) As to settled land, see stat. 45 & 46 Vict. c. 38.

1. A tenant for life may cut down timber trees for the ordinary reparation of houses or fences; but he cannot cut down timber to build new houses or to repair those that he himself has improperly suffered to fall into decay. (1 Cru. T. 3, c. 1, § 19; Co. Litt. 53b.) Timber trees are those which serve for building or reparation of houses, such as oak, ash, and elm, of the age of twenty years and upwards. (1 Cru. T. 3, c. 2, § 5; 2 Bl. Com. 281; Co. Litt. 53a.) By the custom of some countries certain trees not usually considered as timber are deemed to be such; as being there used for building. (1 Cru. T. 3, c. 2, § 6; 2 Bl. Com. 281; Co. Litt. 53a; *Honeywood v. Honeywood*, L. R. 18 Eq. 306; *Dashwood v. Magniac*, (1891) 3 Ch. 306.) **265**

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1. Waste in trees and hedges. For what purposes tenant for life may cut timber. What is timber.

Estates for life are usually given "without impeachment of waste." And where this is the case, the tenant for life has a right to fell timber and convert it to his own use, and he is entitled to the property of all timber trees blown down. (1 Cru. T. 3, c. 2, § 51, 54.) And prior to the Supreme Court of Judicature Act, 1873, he might, at Law, cut down even timber serving for shelter or ornament to a mansion house or its grounds, or timber not fit to be felled; which is commonly called equitable waste, because it was deemed improper and restrainable in Equity, though it was permitted at Law. (Sm. Eq. Manual, 13th ed. pars. 767-8a.) But by that Act, s. 25, clause (3), it is enacted that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." **266**

Rights of tenant for life without impeachment of waste.

The prohibitions against waste apply with even Rights of

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tenant for
years.

greater force to tenants for years. But where the clause "without impeachment of waste" is inserted in a lease for years, it will have the same effect as when inserted in the conveyance of an estate for life. (1 Cru. T. 8, c. 2, § 12.) **267**

2. Waste in
buildings.

2. Waste may be done in buildings by pulling them down, or by suffering them to be uncovered, whereby the timbers become rotten. (1 Cru. T. 3, c. 2, § 11; Co. Litt. 53a.) **268**

If glass windows, though put in by the tenant himself, are broken or carried away, it is waste. So it is of wainscot, benches, doors, floors, furnaces, and the like, annexed or fixed to the house either by the reversioner or the tenant. (1 Cru. T. 3, c. 2, § 13; 2 Bl. Com. 281; Co. Litt. 53a.) **269**

3. Waste as
regards mines
and pits.

3. A tenant for life or years cannot dig for gravel, lime, clay, brick-earth, stone, &c., where there are no pits open, except for the reparation of buildings or manuring of the land. A tenant for life or years may work open mines, but may not dig for any new mine. (1 Cru. T. 3, c. 2, § 14, 16; 2 Bl. Com. 282; Co. Litt. 53b, 54b.) **270**

4. Altering
the property.

4. If a tenant converts one kind of land into another, or makes alterations in the premises, though they greatly enhance the value of it, it is waste; because he has the use, and not the dominion; and the owner has a right to have the old features and associations of the property unaltered. So that an action may be maintained even for inclosing and cultivating waste land, or pulling down old buildings and substituting new ones of greater value. (Sm. Law of Prop. 6th ed. par. 3395.) **271**

5. Destruction
of heirlooms.

5. The destruction of heirlooms is waste. (1 Cru. T. 3, c. 2, § 20.) **272**

6. Waste may also be committed in ponds, dove-houses, warrens, parks, and the like, by so reducing the number of creatures therein that there will not be sufficient for the reversioner. (2 Bl. Com. 281; Co. Litt. 53a.) **273**

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6. Waste re-
gards living
creatures.

V. *Of Subtraction.*

Subtraction is the withdrawal of, or the neglect to perform any suit, duty, custom, or service, such as the oath of fealty, suit of court, rent, or other service due to the lord of the fee. For this, the remedy is, distress by way of pledge to enforce performance. (3 Ste. Com. 451-3.) **274**

VI. *Of Disturbance.*

Disturbance is usually a wrong done by hindering the owner of a hereditament in the regular and lawful enjoyment of it. **275** Such as—

1. The disturbance of franchise, for which an action of franchise, will lie. **276**

2. The disturbance of common, by putting on the cattle of a stranger, or by putting on creatures which are not commonable, or more than the proper number of creatures, or by destroying the common, or ploughing up the soil, erecting fences, driving out the cattle, &c.; for which an action will lie, and in some instances a distress. **277**

3. The disturbance of a right of way; for which an action for damages will lie. **278**

4. The disturbance of tenants, by the driving them away from the estate; for which a landlord has an action for damages. **279**

5. The disturbance of patronage, which is an obstruction of patronage.

tion of a patron in presenting to a benefice. (3 Ste. Com. 453-7.) **280**

VII. *Other Injuries to Real Property.*

Right to
support of
adjacent soil.

Apart from any question of negligence, no one has a right to deprive the soil of his neighbour, which is in its original condition, of lateral support. But where the plaintiff has placed a house or other additional weight upon his ground, he cannot, independently of any acquired right, insist upon its being supported by the adjoining land of the defendant. If, however, the defendant's excavations would have caused the plaintiff's land to sink appreciably had there been no erection upon it, the defendant will be liable. Where the defendant, by draining his land, drained away his subterranean water from under the plaintiff's land, and thereby caused it to sink, it was held that no action was maintainable. (*Popplewell v. Hodgkinson*, L. R. 4 Ex. (Ex. Ch.) 248.) But the plaintiff may acquire a right to the support of the defendant's soil for his buildings by grant, express or implied. (*Elliot v. North Eastern Rail. Co.*, 10 H. L. C. 333; *Rigby v. Bennett*, 21 Ch. D. 559.) Such a grant is to be presumed by the lapse of twenty years during which the support has been enjoyed. (*Angus v. Dalton*, 6 App. Cas. 740; Ad. Torts, 278, 306, 331; Gale, 328-30, 338-63; 2 Rose. 769.) **281**

Endangering
another's
buildings.

It may here be observed that a person who pulls down a house or wall which touches the house or wall of another person is liable for any damage arising from want of due care and skill and proper precautions. And if a person makes an excavation on his land close to his neighbour's, in an improper manner, or without

giving his neighbour notice and opportunity to protect his buildings, he will be responsible for any damage thereby occasioned to an adjoining house if it has a right of support, but not to an adjoining cellar of which he was not aware. (Ad. Torts, 306, 379; 2 Rose. 768-9; *Angus v. Dalton*, 6 App. Cas. 740; *Tone v. Preston*, 24 Ch. D. 739.) **282**

It was formerly held that if two houses were erected against each other having separate and independent walls resting upon separate and independent foundations, and stood independently of each other, one had no right of support from the other, even if it received that support for twenty years; but it has now been decided that where ancient buildings, belonging to different owners, adjoin each other, each building has a right of support from the other which can be claimed under the Prescription Act. (Ad. Torts, 331; *Lemaitre v. Davis*, 19 Ch. D. 281; *Tone v. Preston*, 24 Ch. D. 739.) **283**

There are certain rights which the owner of one neighbouring tenement has with respect to another such tenement. **284**

Rights of
neighbouring
proprietors.

Those which are directly profitable are called profits à prendre; such as rights of common. **285**

Profits à
prendre.

Those which are mere rights of accommodation are termed easements. An easement may be defined to be a right and privilege, without profit, which the owner of one neighbouring tenement has with respect to another tenement, and by reason of which for the advantage of the owner of the tenement whereto such privilege is annexed, the owner of such other tenement is obliged to suffer, or refrain from doing, something on his own land. There are a great number of easements; such as rights of way, rights to receive air,

Easements.

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Dominant
and servient
tenements.

light, and water. (Gale, 6, et seq.; Ad. Torts, 271; Burton, § 1165; Goddard, 2, 38-115.) **286**

The property to which the privilege is annexed as a benefit is termed a dominant tenement; and the property on which the burden or servitude is imposed is called the servient tenement. (Goddard, 15; Gale, 6.)

287

The disturbance of an easement should be distinguished from a nuisance, which is an infringement of a natural right of property. **288**

Rights of
riparian
proprietors.

Where there are distinct proprietors of the lands on opposite banks of a stream, each riparian proprietor is *primâ facie* the proprietor of the half of the land covered by the stream which is nearest his own bank, and has the right of fishing over that half, but has no property in the water. Every landowner, however, has a right, as an ordinary incident of property, to use the water of a natural stream flowing through or by his land, for any reasonable purpose not inconsistent with a similar right in the proprietors of the land above and below; as, for instance, to drink, to water his cattle, to turn his mill, &c. But he cannot seriously diminish the quantity, nor deteriorate the quality, nor alter the flow of the water, to the injury of another proprietor, otherwise than by such diminution, retardation, or acceleration, as may be the necessary result of a reasonable use; unless he has gained a title to an easement, by grant or prescription, so to use the water. (Ad. Torts, 272, 389, 398, 441; Broom, Com. 886, 902; Gale, 212-49; 2 Rose. 792, 932; Goddard, 72-100.) **289**

Well water.

A person may sink a well in his own land, and get as much water as he pleases, for any purpose whatever, although he thereby drains the neighbouring springs and wells dry; and the adjoining proprietor has no

other remedy than to sink deeper wells, and use appliances to get back the water. (Ad. Torts, 277; Goddard, 90-5; Gale, 252-68; *Chasemore v. Richards*, 7 H. of L. Cases, 349.) The right of the owner of land to divert or appropriate the percolating water within his own land is the same whether his motive be to improve his own land or to maliciously injure his neighbour. (Broom, Com. 907-8; *Corporation of Bradford v. Pickles*, (1895) A. C. 587.) **290**

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If the owner or occupier of the lower lands obstructs the natural flow of the water through his lands, so as to cause the higher lands to be flooded, or if the owner or occupier of the higher lands causes the surface and drain water to flow on the lands below in a greater volume and in an unnatural form, he will be responsible in damages. (Ad. Torts, 275.) **291**

Servitude of
receiving and
discharging
water.

A person may, by deed or prescription, have a right of passage for waste water through an artificial drain or watercourse in another man's land, without having any interest in such land. (Ad. Torts, 296; Gale, 268.) **292**

Passage for
waste water.

A person may acquire a right by prescription to the flow of water in an artificial watercourse if it is of a permanent character, e.g., a mill stream. (Goddard, 320-5.) **293**

Flow of
water.

By the stat. 2 & 3 Will. IV. c. 71, s. 3, when the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible. **294**

Stat. 2 & 3
Will. IV.
c. 71, s. 3.

"Wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through

Light and
air.

that space, a right arises to have that space left for so long as the light passing through it is used for or by the dominant tenement." "And the opening in the dominant tenement," whether it be a window or aperture of any other kind, "is the limit which defines the boundaries of the space over the servient tenement." (Fry, J., in *National Provincial Plate Glass, &c. Co. v. Prudential Assurance Co.*, 6 Ch. D. 757, 765; *Pendarves v. Munro*, (1892) 1 Ch. 611.) **295**

On the sale of a house, without the adjoining land of the vendor, a free passage for necessary light and air across such adjoining land is impliedly granted. (Ad. Torts, 307; 2 Rose. 773.) But it has been held that when the owner of a house sells a piece of adjoining land, without reserving any rights, the purchaser may use it for any purpose to which land may be applied; and there is no implied grant, by the purchaser, of the easement of light necessary for the enjoyment of the vendor's house. The V.-C. Kindersley remarked: "It must be admitted that this law, if carried to an extreme, would in some cases produce great and startling injustice." (*White v. Bass*, 7 H. & N. 722; *Master v. Hansard*, 4 Ch. D. 718; *Wheeldon v. Burrows*, 12 Ch. D. 31; *Russell v. Watts*, 10 App. Cas. 590; *Birmingham Banking Co. v. Ross*, 38 Ch. D. 295.) **296**

Right to
build in one
person, and
right to light
and air in
another.

Every landowner has a perfect right to build on his own ground, though he thereby obscures his neighbour's light and air, unless his neighbour has acquired a right against him that his light and air shall not be obstructed. This easement of right to uninterrupted light and air may be acquired, like other easements, by grant, express or implied, by covenant, by prescription, by virtue of an Act of Parliament, by devise, or under a custom. (Goddard, 39-57.) **297**

Where the owner of a dwelling-house and adjoining land sells the house to one person and the land to another at the same time, either purchaser having notice, the purchaser of the land cannot obstruct the lights of the house. (Ad. Torts, 307.) **298**

A right to uninterrupted air from any direction (e.g., Right to air. to a mill) can never be acquired by prescription; but a right can be acquired to a definite current of air through a defined channel. (Goddard, 43-7; *Webb v. Bird*, 4 C. P. D. 172; *Chastey v. Ackland*, (1895) 2 Ch. 389; (1897) A. C. 155.) A right to a free escape of air can be acquired by long user. (*Bass v. Gregory*, 25 Q. B. D. 481.) **299**

Neither a landlord nor a tenant can, without each other's consent, obstruct or darken windows existing at the time of the demise. (Ad. Torts. 308.) **300**

The right to light and air is confined to windows existing at the time of the conveyance, grant, or demise, and does not extend to windows subsequently opened where there were none before, or to new windows of a different size or position from the old ones, except as far as regards the space of the new windows which may have been occupied by the ancient apertures. (Ad. Torts, 307-8; *Broom, Com.* 898; 2 *Rosc.* 776.) But the owner may make alterations merely in the framing and glazing of the window, so as to admit more light and air. (*Turner v. Spooner*, 1 D. & S. 467.) **301**

If a new house is erected contiguous to another's ground, the latter may, at any time within twenty years, erect any kind of building on purpose to blind the lights of that house; and no action will lie, even though it is done from mere malice. (*Broom, Com.* 898; *Goddard*, 53-4.) **302**

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CHAP. I.

But the right to the use of light becomes absolute after an absolute enjoyment of it for twenty years next before some suit or action, in which the claim has been brought into question, without an interruption acquiesced in for a year after notice of such interruption. **303**

The right to ancient lights now depends on the statute 2 & 3 Will. IV. c. 71, which makes the right indefeasible after twenty years' uninterrupted enjoyment; and therefore it does not require any grant, prescription, or fiction of a licence; and it cannot be lost by a temporary intermission, not amounting to abandonment, or be forfeited by enlarging the ancient lights or making new lights. (*Tapling v. Jones*, 11 H. L. C. 290; *Aynsley v. Glover*, L. R. 10 Ch. Ap. 283; *Pendarves v. Munro*, (1892) 1 Ch. 611; *Martin v. Price*, (1894) 1 Ch. 276.) **304**

In considering whether there has been an invasion of light, and what is the measure of the damages, the question is this, Is there a diminution of light for any purpose for which the dominant tenement may be reasonably considered available? The owner of the dominant tenement has the right to the admission of a certain quantity of light by means of apertures through which the light has for a certain period been accustomed to pass, without reference to the precise purpose to which he from time to time has chosen to turn it. (*Moore v. Hall*, 3 Q. B. D. 178; *Parker v. First Avenue Hotel Co.*, 24 Ch. D. 282.) **305**

Rights on
grant of part
of tenement.

By the grant of part of a tenement, other part of which is not aliened at the same time, there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith. But under ordinary circum-

stances, there is no corresponding implication in favour of the grantor in respect of the other part retained. Both of these rules are founded on the maxim that a grantor shall not derogate from his own grant. (*Wheeldon v. Burrows*, 12 Ch. D. 31, 49; *Russell v. Watts*, 10 App. Cas. 590.) **306**

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Invasion of privacy, by opening a window which overlooks another man's grounds, is not an act of which the law will take cognizance as a wrongful act. So that a man may make new windows wherever or whenever he pleases on his own premises. But, on the other hand, his neighbour may erect any building he pleases on his own land, however close, so as to obstruct the light from such windows, if he does so before the former has uninterruptedly enjoyed that light for twenty years; unless the person erecting such building thereby obstructs an ancient light. He may not obstruct any ancient light, though it would be impossible for him to obstruct the new windows without obstructing the ancient light. If, therefore, he cannot obstruct the new windows without obstructing the ancient light, he must put up with the new windows, though they may completely destroy his privacy. (*Tapling v. Jones*, 11 H. L. C. 290.) **306a**

Invasion of
privacy, or
obstruction
of prospect.

In general, at Law, an easement can only be granted, in a binding and irrevocable manner, by a deed. (Gale, 25; Goddard, 4, 125; Ad. Torts, 299.) **307**

Express grant
of an ease-
ment.

A grant of a right will not be presumed from long continued uninterrupted enjoyment, unless the enjoyment has been open and notorious, and exercised as a matter of right, and is not capable of being satisfactorily accounted for without presuming a grant. (Ad. Torts, 321.) **308**

Presumption
of a grant.

If, by the act of the owner, one part of his land

Implied grant

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of an ease-
ment.

becomes dependent upon another for water, light, or air, these easements pass to the grantees of the land to which they are annexed, together with the land. And when a person buys one of two or more adjoining houses belonging to the same owner, the purchaser becomes entitled to the benefit, as an easement, of all the drains from it, and is subject as a servitude, to all the drains necessary for the adjoining house. (Ad. Torts, 301-2; Gale, 87-108.) **309**

Way of
necessity.

If a man is possessed of a house, and there is a way necessary for the convenient occupation of the house, manifestly used by the occupiers of the house, a grant or lease of the house with its appurtenances will carry with it the right to use the way. (Ad. Torts, 303.) **310**

Repairs
incident to
easements.

A grantee of a right of way or of an artificial drain or watercourse through the grantor's land, or of the use of a pump in the grantor's land, is bound to repair the way, drain, watercourse, or pump, if he desires to have it kept in order for his own use, or if repairs are necessary to prevent it becoming an annoyance to the owner of the servient tenement. And for that purpose he may enter upon the grantor's land, unless the grantor himself has undertaken to repair it. (Ad. Torts, 296; Gale, 466-7, 477; Goddard, 362. See *Goodhart v. Hyett*, 25 Ch. D. 182.) **311**

Transfer of
rights.

A right which is accessorial to the enjoyment of a house or land passes to the successive assigns of the house or land by a grant of the house or land. (Ad. Torts, 349; Goddard, 132, 359.) **312**

Cesser of
easements.

An easement ceases when the purpose for which it was granted can no longer be accomplished, or when the thing to which it was accessorial ceases, or when the ownership of the dominant and servient tenements becomes vested in the same person, and he has an equal

estate in fee simple in both tenements, or when the right is expressly released or abandoned. A way of necessity ceases when the necessity ceases. (Ad. Torts, 350-60.) **313**

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In the absence of special stipulations to the contrary, the owner of the surface and the owner of the subsoil must not exercise their respective rights in such a way as to be inconsistent with the fair use and enjoyment of the rights of each other. The owner of the surface, therefore, is entitled to the support of the adjacent strata, sufficient to maintain the surface in its natural state, but not to such a degree of support as is necessary for buildings, unless he has acquired the right of support for them by grant or prescription. If, however, the owner of the subsoil excavates without leaving proper support, the owner of the surface has no right of action until some actual damage has been sustained by him; but he may obtain an injunction in Equity to prevent such improper excavation. And the owner of the surface would be entitled to sue for damages for injuries caused by successive subsidences as and when the injuries are sustained by him, although a subsidence should take place more than six years after the excavation; but he cannot obtain damages in respect of future injury until the injury has occurred. (Ad. Torts, 427-8; 2 Rose. 770-1; *Backhouse v. Bonomi*, 9 H. L. C. 503; *Elliot v. North Eastern Rail. Co.*, 10 H. L. C. 333; *Smith v. Thackerah*, L. R. 1 C. P. 564; *Darley Main Coll. Co. v. Mitchell*, 11 App. Cas. 127; *Crumbie v. Wallsend Local Board*, (1891) 1 Q. B. 503; *Att.-Gen. v. Conduit Colliery Co.*, (1895) 1 Q. B. 301.) **314**

Rights of
owner of
surface and
subsoil.

Primâ facie the owner of the surface is entitled not

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only to that, but also to all below it, *ex jure natura*; and those who claim the property in the minerals below, or any interest in them, must show that they are entitled by some grant or conveyance by the owner of the surface. The rights of the grantee of the minerals depend upon the terms of such grant or conveyance. **315**

Waste land
on the side
of a river or
highway.

In the absence of evidence to the contrary, waste land on the side of a river or public highway is deemed to belong to the owner of the adjoining inclosed land, and not to the lord of the manor, unless the waste land communicates with open commons or larger portions of land. (Sm. Law of Prop. 6th ed. par. 301.) **316**

Trees.

The ownership of a tree standing in a hedge follows the ownership of the hedge. Where all the roots of a tree are in a person's land, though the branches hang chiefly or entirely over another person's land, it belongs to the person in whose land the roots are. But where the trunk stands on one person's land and the roots are in another person's land, it belongs to the person on whose land the trunk stands. (Ad. Torts, 446; Dixon, 63-4.) **317**

Walls.

The property in a wall is presumed to be in him who is bound to repair it, or, in the absence of evidence of such liability, in the owner of the land on which it is built. (2 Rosc. 933.) **318**

Liability of
owner of
mischievous
things.

"The person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril; and if he does not, he is *prima facie* answerable for all the damage which is the natural consequence of its escape. This is established to be the law, whether the things so brought be beasts, or water, or filth, or stench." (*Fletcher v. Rylands*, L. R. 1 Ex. (Ex. Ch.) 265;

affirmed, *Rylands v. Fletcher*, L. R. 3 H. L. 330, 340, 341 (a); and see below, pars 429-34.) **319**

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Every one is bound to take care that his cattle do not trespass on his neighbour's land. (*Ellis v. The Loftus Iron Co.*, L. R. 10 C. P. 10.) And he is liable for any trespass thereon, whether he has been guilty of negligence or not (*Ellis v. The Loftus Iron Co.*, L. R. 10 C. P. 10, 12-14), unless there is a fence between his land and his neighbour's land, and that fence belongs to his neighbour, and is not kept in good repair by his neighbour; for in that case, though the owner of the cattle is chargeable with a wrong in suffering his cattle to trespass, yet his neighbour has no remedy, because of his own contributory negligence. **320**

Fences,
hedges and
ditches, and
trespass of
animals.

Where there is no fence, each party must keep his animals on his own land. If he does not, he is liable for any damages. (Dixon, 77.) **321**

Where there is a fence, it is for the owner of the fence alone to keep it up, and the other party need not repair it, and need not make an additional fence for his own protection against the animals of the owner of the fence, or for the protection of the owner of the fence. And if the cattle of either stray into the land of the other, the one injured has a right of action against the other, unless the fence belongs to the person injured, and he has failed to keep it in good repair; in which case he is precluded from suing, by his own contributory negligence. **322**

In some cases there is a kind of easement by which a

(a) Mellor, J., justly remarks, "No doubt that case, affirmed as it was in the House of Lords, is of the highest authority, and concludes every case which comes within the principle of it." (L. R. 7 Q. B. 269, 270.) But see *Nichols v. Marsland*, L. R. 10 Ex. 255; 2 Ex. D. (Ap.) 1.

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person is bound by prescription or contract to keep up his fence, not only to prevent his own animals from straying, but also to keep out his neighbour's, not for his own protection, but for the protection of his neighbour. But, in general, a person is not bound to fence out his neighbour's animals for his neighbour's protection, but only to fence out his neighbour's animals for his own protection, and to keep in his own animals. (Ad. Torts, 297; Gale, 455.) **323**

The statute 8 Vict. c. 20, s. 68, however, enacts that "a railway company shall make and maintain, for the accommodation of the owners and occupiers of lands adjoining the railway, . . . sufficient fences for separating the land taken for the use of the railway from the adjoining lands not taken; and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway." The word cattle here includes pigs. (*Child v. Hearn*, L. R. 9 Ex. 176, 182 (a).) **324**

In general a boundary hedge belongs to the owner who has been in the habit of cutting and repairing it. But, in some cases, the owners of the adjoining lands are tenants in common with the hedge; and in such cases each has a right to clip the hedge, but not to destroy it. (Ad. Torts, 411.) **325**

A person may make a ditch, and widen it as much as he pleases, so far as he can do so by cutting into his own land. No man making or widening a ditch may cut into his neighbour's soil, but he may and usually does cut to the very extremity of his own land; and he is bound to throw the soil which he excavates on his own

(a) By 50 & 51 Vict. c. 19, the owner of a quarry within fifty yards of a highway must fence it in. (See also *Hawken v. Shearer*, 56 L. J. Q. B. 284.)

land, and he often plants a hedge on the top of the soil so thrown up. And hence, where adjacent lands of two distinct proprietors are divided by a hedge and a ditch, the legal presumption is that both the hedge and the ditch belong to the owner of the field in which the ditch is not situate. (Ad. Torts, 446; Dixon, 76-7; 2 Rose. 933.) But this presumption only applies to a ditch known to be artificial, and not to one which is or may be a natural watercourse. In such a case evidence of ownership must be shown. (*Marshall v. Taylor*, (1895) 1 Ch. 641.) **326**



CHAPTER II.

OF INJURIES TO PERSONAL PROPERTY.

PART I.
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CHAP. II.

Deprivation
of possession
and damage.

Unjust taking
or detainer.

Trespass.

Redress for
unjust taking.

THE rights of personal property in possession are liable to two species of injury : trespass and conversion.

Trespass may be defined as a wrongful meddling by a person, or of an animal belonging to him, with the goods of another ; conversion the depriving another of the possession of his goods. The deprivation of the

possession is also divisible into two branches : first, the unjust taking them away ; and secondly, the unjust detaining them, though the original taking away might be lawful. (3 Bl. Com. 144 ; Broom, Com. 912 ; and see pars. 1488-96, below.) **327**

Thus, if one meddles with the goods and chattels of another, either by laying hold of or removing inanimate things, or by striking or chasing cattle, or other domestic animals in which the owner has a valuable property, he is guilty of trespass ; unless the act can be justified on the ground that it was done in necessary self-defence or of one's property, or in obedience to some legal or personal authority, or can be excused on the ground that it was the result of inevitable accident or caused by the negligence or wrongful act of the plaintiff himself, as where a man wrongfully suffers his cattle to trespass upon another's land. (Ad. Torts, 497.) **328**

There are two descriptions of redress for the unjust taking. The first is the restitution of the specific

chattels taken, with the payment of damages for the loss or injury occasioned by the temporary deprivation of the possession. The second is the giving a pecuniary equivalent in the shape of damages for the permanent loss of the articles taken. (See 2 Bl. Com. 145.) **329**

Trespass and conversion are actionable, although the wrongdoer has acted innocently and without negligence.

329a

Bare possession constitutes a sufficient title to enable the party enjoying it to obtain a legal remedy against a mere wrongdoer. Thus it was held that a chimney sweeper's boy, who had found a jewel, might maintain an action for it, or its value, against a jeweller whose opinion had been asked respecting it, and who, having got possession of it, wrongfully retained it. (Broom, Com. 912-3; *Armory v. Delamirie*, 1 Sm. L. C. 343.) Generally speaking, the finder of goods has a good title thereto against all but the rightful owner. (*Bridges v. Hawksworth*, 21 L. J. Q. B. 75, where a person found bank notes on the floor of a shop.) But where an article is found upon or beneath the surface of land, the presumption is that it belongs to the owner of the land, and not to the finder. (*South Staffordshire Water Works v. Sharman*, (1896) 2 Q. B. 44.) **330**

On the other hand, the owner of the goods may lose his right to sue for trespass or conversion, *e.g.*, when goods have been stolen and sold in market overt to a bonâ fide purchaser, the owner cannot sue the bonâ fide purchaser for conversion; but if the thief be prosecuted to conviction, the property in the goods reverts in the true owner. In the case, however, of goods being obtained by fraud or other wrongful means not amounting to larceny, the property in the goods shall not revert in the owner by reason only of the conviction of the

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Nemo dat
quod non
habet.

offender. (Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 22, 24.) **331**

The above are exceptions to the general rule, *Nemo dat quod non habet*, *i.e.*, no one can give a better title than he has himself. (For other exceptions to this rule, see pars. 749-60.) **332**

Ownership of
creatures
feræ naturæ.

A qualified property may be acquired in creatures *feræ naturæ*—that is, creatures which are of so wild a nature as to shun the dominion of man. (Locke, 2; Oke, 3-6.) Some of these creatures are called game. **333**

There may be a qualified property in game where the creatures are tamed or confined, or in the case of the young of these creatures before they can fly or run away; or in the case of a landholder or tenant having a right to game, by reason of its being on his land; or in the case of a privilege of taking and killing game by virtue of the franchise of a forest, chase, park, or free warren, as distinguished from a mere hare or rabbit warren. (Oke, 15-19, 24-30.) **334**

The principal Game Act was the stat. 1 & 2 Will. IV. c. 32. By ss. 7—11 it is provided, that in the case of **underleases** and agreements made before the 5th October, 1831, the landlord is entitled to the game unless it is expressly given to the tenant, but as to leases or agreements made after that date, the right of sporting, unless expressly reserved under seal to the landlord, belongs to the tenant. (Oke, 87; Locke, 66-8, 110-4.)

335

The Ground Game Act, 1880 (43 & 44 Vict. c. 47), gives all tenants under tenancies commencing after the 7th of September, 1880, an indefeasible right to ground game, *i.e.*, hares and rabbits, concurrent with that of their landlords, with certain limitations. (Oke, 93-5;

Woodfall, 767-9; *Morgan v. Jackson*, (1895) 1 Q. B. 885.) **336**

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A man cannot have an action for another man's rabbits or pigeons coming upon his ground, and doing damage there, because they are no longer the other's than while they are in the warren or place where he has a right to keep them; but they may be destroyed by the owner of any ground on which they may happen to be. (Locke, 35; Ad. Torts, 131; Oke, 21, 195.) **337**

A person who destroys another's dog or cat is in general liable to an action. But if a dog, when loose, is actually attacking a man, he may destroy it, at the time, in self-defence. (Dixon, 398.) And if a dog chases conies in a warren, or deer in a park, or sheep in a fold, or fowls in a poultry yard, he may be killed by the owner, at the time, to prevent their destruction. But it may not be killed after the chasing and the peril have ceased. (Dixon, 147.) Dogs trespassing in pursuit of animals *feræ naturæ* may not ordinarily be destroyed, even though the owner of the dog has received notice that trespassing dogs will be shot (Ad. Torts, 508); but if game is destroyed by a dog which its owner knows to have a propensity to destroy game, its owner is liable to an action by the owner of the ground on which the game is destroyed. (*Read v. Edwards*, 17 C. B. (N. S.) 245.) If an action is brought for the destruction of a dog, its character and mischievous propensities may be considered in mitigation of damages. (Dixon, 398.) If a person sets a trap, though it be for foxes or vermin, and baits it with strong smelling meat, and places it so near to a highway or public path, or to the premises of his neighbour, as to be likely to attract dogs and cats passing along the highway or path, or his neighbour's dogs and cats, and

Injuries to
dogs and cats.

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Injuries by
dogs to sheep
or cattle.

they are injured by getting into the trap, he is liable. (Dixon, 172; Locke, 55.) **338**

By the common law, a man was not liable for injuries done by his dog, unless he had a previous knowledge of his mischievous propensities. (Ad. Torts, 132; Locke, 249.) But by the stat. 28 & 29 Vict. c. 60, s. 1, it is enacted that "the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any court of competent jurisdiction by the owner of such cattle or sheep killed or injured. Where the amount of the damages claimed shall not exceed 5*l.*, the same shall be recoverable in a summary way before any justice or justices sitting in petty sessions under the provisions of the Act 11 & 12 Vict. c. 43." **339**

The second section shows who is to be deemed the owner of the dog. **340**

Horses are included in the word "cattle." (*Wright v. Pearson*, L. R. 4 Q. B. 582.) **341**

Injury to
property by
another's
negligence.

Where the property of one person is injured in consequence of another neglecting to do that which he ought to have done, the latter is liable for the injury: as where A.'s horse is injured by B.'s horse, which trespasses into A.'s field, in consequence of B. neglecting to keep his fence in order. (*Lee*, app., *Riley*, resp., 18 C. B. (N. S.) 722.) **342**

A person who, for his own purposes, brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril. (*Rylands*

v. *Fletcher*, L. R. 3 H. L. 330.) Thus, where a burial board planted a yew tree which grew through the railings, and a horse pasturing near was killed by the poison in the yew, the board were liable (*Crowthurst v. Amersham Burial Board*, 4 Ex. D. 5); but where a horse trespassed on defendant's land and was poisoned by eating the leaves of a yew tree thereon, it was held that the defendant was not liable. (*Ponting v. Noakes*, (1894) 2 Q. B. 281.) **343**

The wrong of conversion is the unauthorized assumption of the powers of a true owner. Actually dealing with another's goods as owner, for however short a time and however limited a purpose, is therefore conversion; so is an act which in fact enables a third person to deal with them as owner, and which would make such dealing lawful only if done by the person really entitled to possess the goods. (Pol. Torts, 318; *Hollins v. Fowler*, L. R. 7 H. L. 757.) **344**

Conversion.

Auctioneers.

It makes no difference that the defendant honestly believed he was entitled, or acted with the intention of benefiting the true owner. Thus an auctioneer who sells goods at the request of the apparent owner is liable to the true owner in conversion. The liability of auctioneers, however, and of agents generally, in respect of wrongful conversion of goods depends upon whether they deal with the goods with the view of the passing of property in them, or whether they merely settle the price or otherwise act as mere intermediaries between the owner and the purchaser. In the former case they are liable; in the latter case they are not liable. (*Barker v. Furlong*, (1891) 2 Ch. 172; *Consolidated Co. v. Curtis*, (1892) 2 Q. B. 495.) **345**

Refusal to deliver goods on demand is evidence but evidence only of conversion, for the refusal may be a

What amounts to conversion.

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qualified and provisional one. Thus a refusal by a servant to deliver up goods he has received from his master, without an order or authority from the latter, is a qualified and justifiable refusal and is no evidence of a conversion. If the owner of goods has delivered them to a bailee to keep for him, so that the bailee has received the goods under a valid title, and the bailor, subsequently to the bailment, has, by bill of sale, transferred all his interest to a stranger, who demands the goods of the bailee, and the latter refuses to deliver them up until he has had time to receive the directions of the bailor, there is no evidence of conversion. (Ad. Torts, 505; and as to bailments, see par. 896a below.) **346**

The property of which the plaintiff is deprived must be something which he has the immediate right to possess. Thus, when goods had been sold, and remained in the seller's possession subject to the seller's lien for unpaid purchase-money, the purchaser could not bring an action of trover against a stranger who removed the goods. (*Lord v. Price*, L. R. 9 Ex. 54.) But an owner not entitled to immediate possession might have a special action on the case, not being trover, for any permanent injury to his interest, as in the case of bailments. (Pol. Torts, 317; and see paragraphs 1488-96 below, as to actions of trover and conversion.) **347**

It is doubtful whether a person not already in possession can commit the wrong of conversion by an act of partial interference with another's property, *e. g.*, an attempted sale of goods without delivery. But if a wrongful sale is followed by delivery, both the seller and the buyer are guilty of conversion. (Pol. Torts, 321.) **348**

A merely ministerial dealing with goods at request of an apparent owner having the actual control of them

is not conversion. But where persons bought cotton innocently and without negligence from a holder who had obtained it by fraud, and had no title, and immediately resold it to a firm for whom they habitually acted as cotton brokers, not making any profit beyond a broker's commission, they were held liable in conversion. The defendants had here exercised a real and effective, though transitory, dominion over the goods. (Pol. Torts, 322; *Hollins v. Fowler*, L. R. 7 H. L. 757.) **349**

A bailee is *primâ facie* estopped as between himself and the bailor from disputing the bailor's title. He is justified in redelivering to the bailor so long as he has not notice of any paramount claim. When there are conflicting claims, the contract of bailment does not prevent a bailee from taking interpleader proceedings by which it may be decided which of the claimants is entitled. (Pol. Torts, 323-4; R. S. C. Ord. LVII.) **350**

Position of a
bailee.

Where a bailee has an interest of his own in the goods (*e.g.*, in the case of a hirer or a pledgee), and acts in excess of his bailment rights, this will be a breach of contract as between him and the bailor. But it will not be conversion unless the possessor's dealing is wholly inconsistent with the bailment contract, as where a hirer destroys or sells the goods. A merely irregular exercise of power such as a sub-pledge is not conversion. **350a**

If a man falsely and maliciously, and without reasonable and probable cause, slanders the title to lands or chattels about to be sold, and people are thereby deterred from buying, or are led to give a less price, the owner will be entitled to compensation in damages. (Ad. Torts, 259-61; Broom, Com. 864; 2 Rosc. 880; Pol. Torts, 284-8; *Halsey v. Brotherhood*, 19 Ch. D. 388.) **351**

Slander of
title to
another's
land or
goods.

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Slander of
quality of
them.

An untrue statement, disparaging a person's goods, published without lawful occasion and causing him special damage, is actionable. (*Western Counties Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218, 222; but see *White v. Mellin*, (1895) A. C. 154.) **352**

Injury caused
by publication
of letters.

The right of property in letters is in the receiver or person to whom they are addressed and delivered, so far as regards the paper on which they are written; but he has no right to publish them without leave from the writer, or, in case of his death, without leave from his executors. (Ad. Torts, 536.) **353**

Mistakes in
telegrams.

Where a telegraph company, by making a mistake in a message, occasion a loss to the sender, he is entitled to damages. And (though otherwise decided in *Playford v. United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706, and *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62; 3 C. P. D. (Ap.) 1, on the ground of want of contract between the company and the sendee) the author conceives it to be perfectly clear on principle, and the American Courts have decided, that where a telegraph company, by making a mistake in a message, occasion an injury to the sendee, they are liable to him, on the ground of tort, though not on the ground of contract. But the sender is not responsible to the sendee for a mistake made by a telegraph clerk in transmitting a message correctly written for transmission. (*Henkel v. Pape*, L. R. 6 Ex. 7; *Lilly v. Smales*, (1892) 1 Q. B. 456.) **354**

CHAPTER III.

INJURIES TO RIGHTS OF PROPERTY NOT HAVING A
CORPOREAL OBJECT.

THE infringement of a copyright, patent, or a trade mark is actionable. (Broom, Com. 85.) **355**

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SECTION I.

Copyright.

Copyright may be defined to be the exclusive right of multiplying copies of an original work or composition. (Williams, 313.) **356**

SECT. I.
Copyright.

For the infringement of copyright the proprietor can bring an action for damages or obtain an injunction. (Ad. Torts, 549-55.) **357**

By the Copyright Act (5 & 6 Vict. c. 45), the right of copyright for books, music, maps, &c., endures for the natural lifetime of the author, and seven years after, or for forty-two years from publication, whichever is the longer. In the case of articles in reviews or magazines the copyright is in the proprietor of the review or magazine for twenty-eight years, after which the right reverts to the author for the remaining period. (Ad. Torts, 547.) **358**

Copyright
Act.

The proprietor of the copyright must register the book, magazine, periodical, or paper at Stationers' Hall. (Ad. Torts, 547.) **359**

Every registered proprietor of copyright may assign his interest by an entry in the register in the form given in the Act. (Ad. Torts, 548.) **360**

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SECT. I.

In order to entitle the author to copyright under the Copyright Act the book must be first published in the United Kingdom. Copyright once acquired extends over the whole of the British dominions. (Ad. Torts, 548.) **361**

By 49 & 50 Vict. c. 33, s. 8, the Copyright Act was extended to literary or artistic work first produced in a British possession, unless otherwise provided; and by an Order in Council, coming into operation Dec. 8th, 1887, the benefit of the Act was extended to the countries who were parties to the Berne Convention. **362**

Newspapers. The Copyright Act extends to newspapers. News in a newspaper is the subject of copyright, and it is no defence to set up a practice by newspapers to copy from one another. (Ad. Torts, 548; *Walter v. Steinkopff*, (1892) 3 Ch. 489.) **363**

Title of a book. It is doubtful whether there can be any copyright in the title of a book. But if the name of a publication is fraudulently adopted an action for infringement of a trade-mark will lie. (Ad. Torts, 548.) **364**

Dramatizing a novel. It is not an infringement of the copyright in a novel to reproduce its incidents in a dramatic form upon the stage, as this is neither printing nor multiplying copies of the work. But a person who prints a drama constructed out of a novel infringes the copyright in the novel. (Ad. Torts, 551; *Reade v. Conquest*, 9 C. B. N. S. 755; *Warne v. Seebohm*, 39 Ch. D. 73.) **365**

Lectures. In all lectures printed and published by the author, or his assigns, there is the same copyright as in printed works; and an injunction may be obtained to prevent persons attending lectures from taking notes and publishing such lectures for profit without the owners' consent. (Ad. Torts, 552; *Caird v. Sime*, 12 App. Cas. 552.) **366**

Where the plaintiffs, under an agreement with the Committee of the Stock Exchange, were allowed to collect information as to the prices of stocks and shares, it was held that they had a right of property at common law to the information so collected. **367**

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CHAP. III.
SECT. I.

*Exchange
Telegraph Co.
v. Gregory.*

By the Copyright (Musical Composition) Act, 1882 (45 & 46 Vict. c. 40), the proprietor of the copyright in any musical composition first published after the 10th of August, 1882, who desires to retain the exclusive right of public representation, or performance of the same, shall print, or cause to be printed, upon the title page of every published copy of such musical composition, a notice to the effect that the right of public representation or performance is reserved. (Ad. Torts, 552.) **368**

Copyright may also be acquired in dramatic pieces, sculpture, paintings, drawings, photographs, prints, engravings, and designs. (Ad. Torts, 554-60.) **369**

Dramatic
pieces,
sculpture,
paintings, &c.

A tableau vivant, intended to reproduce a copyright picture, being merely temporary, is no reproduction of a painting or design within sect. 1 of the Copyright Act, 1862 (*Hanfstaengl v. Empire Palace* (No. 1), (1894) 2 Ch. 1); but a sketch in an illustrated paper of such tableau vivant may be an infringement. (*Hanfstaengl v. Baines*, (1895) A. C. 20.) **370**

Tableau
vivant.

SECTION II.

Patents.

A patent is a grant from the Crown by letters patent to the true and first inventor thereof of the monopoly of making, exercising, and vending a new invention. (Edm. 1-2.) **371**

SECT. II.

Definition of
a patent.

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CHAP. III.
SECT. II.

Statute of
Monopolies.

The granting of monopolies is an ancient prerogative of the Crown, and the abuses of this power in the reigns of Elizabeth and James I. led to the passing of the Statute of Monopolies (21 Jac. 1, c. 3), by which monopolies in general were prohibited; but it was expressly enacted that no declaration contained in the statute should extend to any letters patent for the term of fourteen years or under for the sole working, or making, of any new manufacture. (Edm. 11-15.) **372**

Patents Act,
1883.

The law relating to patents is now mainly regulated by the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57), as amended by the Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50). **373**

Term of
patent.

A patent may be granted for fourteen years, which term, if the Judicial Committee of the Privy Council report that the patentee has been inadequately remunerated by his patent, may be extended for a further term not exceeding seven, or, in exceptional cases, fourteen years. (Edm. 276, 496-527.) **374**

Subject-
matter of
letters patent.

In order that an invention may be a subject for letters patent, it is necessary that it should be (1) a manner of manufacture; (2) new; (3) useful; (4) more or less ingenious. (Edm. 18-105.) A patent can be validly granted for an addition or improvement to an already known process, machine, &c. (Edm. 38.) **375**

To whom
granted.

A patent must be granted to the true and first inventor or inventors, or to one or more persons who include the true and first inventor. (Edm. 15, 263-8.) **376**

Co-owners of
a patent.

Either of two joint patentees may use the patent without being liable to account to the other for profits, but neither may dispose of the right of the other; nor can one co-owner release an infringer for liability

to damages to the other co-owner. (Edm. 270-80; Ad. Torts, 569-70; *Steers v. Rogers*, (1893) A. C. 232.) **377**

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SECT. II.

An application for a patent must be made in a prescribed form, and sent to the Patent Office, accompanied by either a provisional or complete specification describing the nature of the invention. A complete specification, if not left with the application, must be left within nine months. If no opposition be entered, or if opposition though entered be successfully met, the Comptroller-General of Patents will cause a patent to be sealed with the seal of the Patent Office and dated as of the day of the original application. Certain payments must be made on the application for a patent and at prescribed periods during its continuance. (Edm. 118-29.) **378**

How patent
obtained.

Letters patent are freely assignable, and the assignee may bring in his own name the same actions and suits at law and in equity against those who have infringed upon the patent as the patentee himself might have done. All assignments of letters patent must be registered. (Williams, 309.) **379**

Assignment
of patent.

The Patents, Designs, and Trade Marks Act, 1883, provides that a register of patents shall be kept at the Patent Office. This register of patents is open to the inspection of the public, and certified copies of every entry in the register may be furnished by the Comptroller on payment of the prescribed fee. (Edm. 309-20.)

Register of
patents.

380

The remedy of a patentee for an infringement of his patent is to bring an action against the wrongdoer claiming an injunction to restrain him from further infringement and damages. **381**

Remedy for
infringement
of patent.

A patent may be infringed by manufacturing articles What

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amounts to
infringement.

by means of the invention, or any imitation thereof; by using, or selling, or otherwise dealing in articles in violation of the patent, without the consent of the patentee; by making for use or sale, or vending articles, which counterfeit or resemble articles made in pursuance of the invention. There may be an infringement though the intention of the party be perfectly innocent, and even though he may not know of the existence of the patent itself. (Edm. 321-3; Williams, 311; Ad. Torts, 321-3.) **382**

SECTION III.

Trade Marks.

SECT. III.
Definition.

A trade mark is some particular mark or device used by a manufacturer to distinguish goods made by him. (Williams, 327.) **383**

Registration
of trade
marks.

Before the Trade Marks Registration Act, 1875 (now repealed), took effect, if a trade mark came by use to be recognized in trade as the mark of the goods of a particular manufacturer, he acquired an exclusive right to use the trade mark, in connection with goods of the same kind, for the purpose of indicating the manufacturer or place of manufacture. Since that Act took effect registration of a trade mark has been essential to the enjoyment of an exclusive right to use it. (Williams, 327.) **384**

By the Patents, Designs, and Trade Marks Acts, 1883 and 1888, which have now taken the place of the Act of 1875, no infringement of a registrable trade mark can be restrained or civilly punished unless the mark has been registered. A trade mark must be registered

as belonging to particular goods or classes of goods.
(Sebast. 97-8, 385-8.) **385**

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CHAP. III.
SECT. III.

Registration of a trade mark shall be deemed to be equivalent to public use of the trade mark. (Patents, Designs, and Trade Marks Acts, 1883, s. 77; 1888, s. 17.)

386

By the Patents, &c. Act, 1883, s. 64, as amended by the Patents, &c. Act, 1888, s. 10, a trade mark must consist of or contain at least one of the following essential particulars:—(1) A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner; or (2) a written signature, or copy of a written signature, of the individual or firm applying for registration thereof as a trade mark; or (3) a distinctive device, mark, brand, heading, label, or ticket; or (4) an invented word or words; or (5) a word or words having no reference to the character or quality of the goods, and not being a geographical name. (Sebast. 24; *Densham's Trade Marks, In re*, (1895) 2 Ch. 176; *Holt's Trade Mark, In re*, (1896) 1 Ch. 711; *Rowland v. Mitchell*, (1897) 1 Ch. 71.) **387**

What trade mark must consist of.

The common law recognized no right of property in a trade mark, and therefore in an action for damages for wrongfully using a trade mark fraud was held to be the gist of the action, and the plaintiff failed unless he could show the defendant used the trade mark with intent to mislead the public. In Courts of Equity, however, it was held that the intent of the defendant was immaterial. The right to a trade mark registered under the Trade Marks Act, 1875, or the present Patents, Designs, and Trade Marks Acts, 1883 and 1888, is strictly a right of property; the person entitled to it is the proprietor and has the exclusive use of it. But his rights in some respects are limited, e. g., he

Trade mark is a property right.

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SECT. III.

Remedy for
infringement
of trade
mark.

Right to a
trade name.

cannot transfer the trade mark except in connection with the goodwill of the business. (Sebast. 172, 186-7.)

388

The remedy for infringement of a trade mark is an action for damages and an injunction. Where the trade mark has been used with knowledge that it belongs to another manufacturer, the Court will decree an account of profits, and give compensation in respect of the past use after knowledge of the prior right. (Sebast. 178, 191-4; Ad. Torts, 583.) **389**

If the goods of a particular trader have, by long user, become known in the market by a non-descriptive trade name, he acquires a right to prevent any other person from using the same in connection with the same kind of goods for trade purposes in such a way as is likely to induce people to believe that the goods offered for sale by the latter trader are goods manufactured by the former. The right is founded upon, and limited by, the rule that no man is entitled to represent his goods as being the goods of another man. (Sebast. 271-82; Williams, 332-3; *Powell v. Birmingham Vinegar Brewery Co.*, (1896) 2 Ch. 54; (1897) A. C. 710; *Reddaway v. Banham*, (1896) A. C. 199.) **390**

In some cases, the use of a man's own name may be such as to deceive, and where this is so the person aggrieved is entitled to obtain an injunction against such use of the name; but he must prove clearly the fraudulent intent. (Sebast. 283; *Burgess v. Burgess*, 3 De G. M. & G. 896; *Reddaway v. Banham*, (1896) A. C. 199.) **391**

TITLE IV.

Injuries to Person and Property generally.

CHAPTER I.

OF NUISANCE.

A NUISANCE is something done which has the effect of prejudicially and unwarrantably affecting the enjoyment of the rights of another person. **392**

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Definition of
a nuisance.

The acts of several persons acting independently may cause a nuisance, for which the person injured may obtain redress, although he cannot show what share each of the several persons contributing to the nuisance had in causing the nuisance, and although the damage caused by the acts of any one of them, if taken alone, would be inappreciable. (*Thorpe v. Brumfitt*, L. R. 8 Ch. Ap. 650; *Lambton v. Mellish*, (1894) 3 Ch. 163; *Sadler v. Great Western Ry. Co.*, (1896) A. C. 450.)
393

Redress cannot be obtained for a thing as a nuisance, where it merely involves a reasonable use of the rights of the person charged with creating it, and it merely abridges the pleasure of the person suffering from it: it must, at the least, unwarrantably render the enjoyment of life or property uncomfortable. And hence the carrying on an offensive trade may be actionable if carried on in one locality, but not so if carried on in another. (See Ad. Torts, 366; 2 Rose. 724; Pol. Torts,

Where
redress not
granted for a
thing as a
nuisance.

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366; *Aldred's Case*, 9 Co. Rep. 57 b; *Bamford v. Turnley*, 3 B. & S. 62; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Tipping v. St. Helen's Smelting Co.*, 11 H. L. C. 642; *Crump v. Lambert*, L. R. 3 Eq. 409; *Reinhardt v. Mentasti*, 42 Ch. D. 685.) **394**

Different
sorts of
nuisances.

Some nuisances affect the enjoyment of rights concerning the person: others affect the enjoyment of proprietary rights. **395**

Nuisances are either public or private. Public or common nuisances are those things which prejudicially affect the public, *i. e.*, all persons who come within the sphere of their operation, though they may affect some persons more than others, such as an obstruction to a highway. Private nuisances are things prejudicial to the enjoyment of private rights. (Broom, Com. 820-3; 3 Ste. Com. 44-5; Pol. Torts, 359-60.) **396**

Remedy for
public
nuisance.

The proper remedy for a public nuisance is an indictment or information; an action will not lie at the suit of a private person, unless he has sustained special damage beyond that sustained by other persons, and the damage is direct and substantial. (2 Rose. 721; Ad. Torts, 10; Pol. Torts, 361; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Att.-Gen. v. Shrewsbury Bridge Co.*, 21 Ch. D. 752.) **397**

Abatement of
nuisance.

If a man apprehends that a nuisance will be committed, he has no right to enter upon his neighbour's land to prevent it. But when it exists he may make a peaceable entry upon and interfere with the property of the wrongdoer, so far as may be necessary to abate it, in the way least injurious to such wrongdoer. The occupier should, however, first be required to abate it himself; unless the nuisance causes such imminent danger to life as to render it unsafe to wait for its removal by the occupier. As to a public nui-

sance, it cannot be abated by a private individual, unless it injures him in some peculiar manner, distinct from that in which the public generally are affected by it, in which case he may abate it so far as may be necessary to the enjoyment of his own rights. (Broom, Com. 209-11; 2 Rose. 721; *Roberts v. Rose*, 4 H. & C. 105.)

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398

If trees overhang from one person's land to that of another, the latter can abate the nuisance without notice by cutting the projecting branches. A man cannot acquire a right to allow his trees to overhang the land of his neighbour by prescription, or by any Statute of Limitation. (*Lemmon v. Webb*, (1895) A. C. 1.)

Abatement
without
notice.

399

A person will become liable to an action for a nuisance by erecting a building which overhangs another's house or land; or by fixing a spout or projection which tends to cause a quantity of water to descend on another's house or land; or by firing off explosive substances, close to his neighbour's land, in order to frighten the game; or by setting up a noisy, noxious, or offensive trade, such as a smith's forge, a brewery, a soap-boilery, a tallow-furnace, a dye-house, or smelting works, or by burning bricks; unless it is in a place where it does not amount to a nuisance to the party complaining, or the person exercising it can establish a prescriptive right, by showing that he has exercised it without molestation or interruption in the same manner for twenty years. So a person will be liable by erecting a privy or hogstye, to the annoyance of his neighbour, or allowing the filth of his cesspool or drain to percolate through his neighbour's land and contaminate the water of his well or spring, or to enter the drain for waste water through his neighbour's land. And so, if a man injures the grass, or corn, or cattle, of

Injurious
affecting
another's
property, or
his reason-
able enjoy-
ment of it.

another, or obstructs the private way, or in any other manner besides that already mentioned, corrupts or diverts, or prejudicially affects the watercourse of another, it is a nuisance, for which the law will give a remedy. (Ad. Torts, 362-74; Broom, Com. 880-3; Gale, 431-53; *Bamford v. Turnley*, 3 B. & S. 62; *Cavey v. Ledbitter*, 13 C. B. (N. S.) 470; *Tipping v. St. Helen's Smelting Co.*, 11 H. L. C. 642; *Robinson v. Kelvert*, 41 Ch. D. 88; *Reinhardt v. Mentasti*, 42 Ch. D. 685.) **400**

If the occupier of a house allows the filth which arises on his premises, or which he is bound to receive in his drain, to enter neighbouring premises, otherwise than by the old accustomed channel, through want of repair of the drain, he is liable in damages, though he may be ignorant of the want of repair, or even of the existence of the drain, and though he may have been guilty of no wilful neglect. (*Humphries v. Cousins*, 2 C. P. D. 239.) **401**

A person who, for his own purposes, brings upon his land, and keeps there, water in such quantities as to be likely to do mischief if it escapes, is answerable for damage caused thereby. (*Rylands v. Fletcher*, L. R. 3 H. L. 330.) **402**

Remedy in
damages.

The remedy in all these cases is by action for damages. **403**

No action for
diminishing
another's
pleasure.

An action cannot be maintained on the mere ground that the cause of action diminishes the pleasure of the party affected by it. So that the building of a wall which merely shuts out a prospect, without obstructing the light, or the opening of a window which destroys the privacy of another, is not actionable. (3 Ste. Com. 446; *Goddard*, 110-2; 2 Rose. 725.) And no action is maintainable in respect of an injury (as injurious

vibration to a house or the like) consequential on the use of a railway or other undertaking authorized by the legislature. (*London, Brighton and South Coast Rail. Co. v. Truman*, 11 App. Cas. 45.) **404**

A right to do something that otherwise would be a nuisance may be established by prescription; but until the nuisance arises no one can complain; and so a right, for instance, to carry on a noisy trade is not gained by carrying it on for twenty years, unless it was actionable or preventible by plaintiff or his predecessors for that period. (*Sturges v. Bridgman*, 11 Ch. D. 852.) There can be no prescription for a public nuisance, because it cannot have a lawful beginning. (Gale, 431-2; Pol. Torts, 369.) **405**

A person is not debarred from suing for a nuisance because it existed before he came to its neighbourhood. (*Fleming v. Hyslop*, 11 App. Cas. 686.) **406**

A nuisance is not justified by showing that the trade or occupation causing the annoyance is, apart from that annoyance, an innocent or laudable one. (Pol. Torts, 368.) **407**

CHAPTER II.

OF NEGLIGENCE.

PART I.
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CHAP. II.

Definition of
negligence.

NEGLIGENCE has been defined as the omission to do something which a reasonable man would do, or the doing something which a reasonable man would not do, whereby damage has been caused to the plaintiff. (*Blyth v. Birmingham Waterworks Co.*, L. R. 11 Ex. 784.) But negligence will not be a ground of liability unless the party whose conduct is in question is in a situation that brings him under the duty of taking care. The degree of care varies according to circumstances. Thus, a person whose duty it is to show skill, as for instance, a doctor in performing an operation, is negligent if he fails to exhibit such skill. (Pol. Torts, 392-6.) **408**

Granted that a person has been negligent, he is only liable for the natural consequences of such negligence. The damage shown must not be too remote. (See pars. 1523-5 below.) **409**

Evidence of
negligence.

Where there is no contract between the parties, the burden of proof is on him who complains of negligence. He must show facts inconsistent with due diligence on the part of the defendant. (Pol. Torts, 397; *Wakelin v. London and South Western Rail. Co.*, 12 App. Cas. 41.) But where there is a relation of contract between the parties, the mere fact of an injury happening, if unexplained, is evidence of negligence. There is also

a presumption of negligence when the cause of the mischief was apparently under the control of the defendant or his servants. (Pol. Torts, 400.) **410**

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CHAP. II.

There is an obligation on the part of the occupier of property, whether fixed or moveable, to those who (at his invitation, expressed or implied) come on that property, to take, by himself and servants, reasonable care that the person so coming shall not be exposed to unusual danger. (*Smith v. Steele*, L. R. 10 Q. B. 125, 127.) **411**

Obligation on the part of occupier of property fixed or moveable.

If a landowner suffers a path to his house to be used, he is responsible for any act of his whereby injury arises to other persons who have any reasonable occasion for coming to the house, without giving them timely notice, or revoking the licence to use it. (Ad. Torts, 314.)

Dangerous paths.

412

If a householder or occupier of premises leaves a cellar, vault, area, hole, or sewer unguarded, or insufficiently covered over, and so close to a highway as to be dangerous to passengers in the dark or in foggy weather, he is responsible for any injury occasioned thereby. (2 Rosc. 725; *Hadley v. Taylor*, L. R. 1 C. P. 53; *Holmes v. North Eastern Rail. Co.*, L. R. 4 Ex. 254; 6 Ex. (Ex. Ch.) 123.) But a way may be dedicated to the public subject to risk arising from its state or condition. (*Robbins v. Jones*, 15 C. B. (N. S.) 221.) And persons may be allowed to frequent and use dangerous places at their own peril, in which case the owner is not, if there be nothing in the nature of a trap, liable for any injury that may befall them. (*Ivay v. Hedges*, 9 Q. B. D. 80; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Corby v. Hill*, 4 C. B. (N. S.) 556.) Such persons are sometimes termed bare licensees; their position is better than that of a trespasser in that they are entitled not to

Dangerous vaults, areas, holes, or sewers.

Bare licensees.

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TIT. IV.
CHAP. II.

Duties to
persons
coming on
property by
invitation.

have the condition of the way so altered as to set a trap for them. (Pol. Torts, 468, 471-4.) **413**

The duties owed to persons who are brought within risks of unsafe condition or repair by the occupier's invitation, or are there in the exercise of a right, are, as has been seen, more extensive. Such persons are entitled to expect that the occupier shall use reasonable care to prevent damage from unusual or unexpected danger, which he knows or ought to know. (*Indermaur v. Dames*, L. R. 1 C. P. 274.) **414**

Thus, where there is a hole or shoot on premises which is unreasonably dangerous to persons not usually employed there, though it be necessary, the occupier of the premises will be responsible in damages, if he suffers it to be unfenced when not in use, and a person having lawful business there in which the occupier is interested sustains injury thereby. (*Indermaur v. Dames*, L. R. 1 C. P. 274; 2 C. P. (Ex. Ch.) 311.) And when gangways for access to ships in a dock were provided by a dock company, the company was held answerable for their safe condition to a person having lawful business on board one of the ships, for the providing of access for all such persons is part of a dock-owner's business. (*Smith v. London and St. Katharine's Docks Co.*, L. R. 2 C. P. 326.) And where a workman was employed under contract with a ship-owner to paint his ship lying in a dry dock, and he suffered injuries from the defective state of the staging provided by the dock-owner, the dock-owner was held liable to him. (*Heaven v. Pender*, 11 Q. B. D. 503; Pol. Torts, 462.) **415**

In the case of an injury to a stranger by the defective repair of premises let to a tenant, the tenant is *primâ facie* liable; and the landlord is, it seems, only liable where he has contracted to repair and the tenant

can sue him for non-repair. Apart from contract, there is no duty on the owner of an unfurnished house, as between him and the tenant, to see the house is let to the tenant in safe condition at the commencement of the term (*Nelson v. The Liverpool Brewery Co.*, 2 C. P. D. 311; *Lane v. Cox*, (1897) 1 Q. B. 415); but the owner of a building let in flats is answerable for the safe condition of the common staircase to persons coming to do business with any of the tenants. (*Miller v. Hancock*, (1893) 2 Q. B. 177.) **416**

Whoever keeps an animal which is wont to attack mankind, is liable to an action for damages for any injury caused by it, if he knew, or there is some evidence that he knew, its propensity. In the case of notoriously dangerous, fierce, or mischievous species, such as a monkey (*May v. Burdett*, L. R. 9 Q. B. 101), or an elephant (*Filburn v. Aquarium Co.*, 25 Q. B. D. 258), such knowledge is presumed. If the animal is of a tame and domestic kind, such as a dog, proof must be given of its ferociousness, and that the owner knew it to be vicious. (*Osborn v. Chocqueel*, (1896) 2 Q. B. 109.) It is enough to show that the animal has previously manifested a savage disposition, whether it has actually bitten anyone before or not. As regards injury to cattle or sheep by a dog, the owner is liable without proof of knowledge of its propensity. (28 & 29 Vict. c. 60.) But a person may allow a fierce dog to be loose at night for the protection of the premises; yet not in the open approaches to a house, so as to injure persons lawfully coming to it. And a man has no right to put a dog so near a path, even a private path, with such a length of chain that he could bite a person going along it. (Ad. Torts, 132-5; 2 Rose. 748-50; Pol. Torts, 450-1; *Worth v. Gilling*, L. R.

Ferocious or
mischievous
animals.

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CHAP. II.

2 C. P. 1; *Applebee v. Percy*, L. R. 9 C. P. 647.) **417**

A servant's knowledge of a dog's ferocity is the knowledge of the master, if the employment of the servant is such as to make it his or her duty to communicate the information to the master, and it is likely that it was so communicated. (*Baldwin v. Casella*, L. R. 7 Ex. 325; *Applebee v. Percy*, L. R. 9 C. P. 647.) **418**

A person cannot escape liability on the ground that he is not the owner of the dog or other ferocious or mischievous animal. It is enough if he harbours or allows to frequent his premises an animal known to be mischievous or dangerous. (Ad. Torts, 132; *Smith v. Great Eastern Rail. Co.*, L. R. 2 C. P. 4; *Gardner v. Hart*, 44 W. R. 527.) **419**

Injuries from
furious or
careless
driving.

A person walking or riding on a road who sustains an injury in consequence of the furious, careless, or negligent driving of another, may maintain an action, unless his own want of reasonable care conduced to the injury. (See Oliph. 287.) **420**

An employer is liable for the act of his driver. But the act of the driver must be done in the course of his employment (*Storey v. Ashton*, L. R. 4 Q. B. 476); although it may be contrary to the regulations of the company by which he is employed. (2 Rose. 734.) And a master is not liable for the wilful and malicious act of his servant. (2 Rose. 734.) **421**

When a coach is overturned and a passenger is thrown out, owing to the carelessness of the driver, the passenger may bring an action against the coach proprietor. (3 Ste. Com. 413; 2 Rose. 734-5.) **422**

Injury
through

The owner of a cart or carriage must take care to have good tackle, and is liable for injuries occasioned

through neglect in this respect, as where, in consequence of defective reins breaking, a foot passenger is run over and injured. (Oliph. 289.) **423**

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TIT. IV.
CHAP. II.

defective
tackle.

A person driving is not bound to keep on his proper driving side; but when on the other side, he must use greater care to avoid a collision. A person driving over a crossing for foot-passengers, or in a crowded part, ought to drive slowly and carefully; but it is also the duty of a foot-passenger to use due care, so as not to get recklessly among the carriages. (Oliph. 306-7; 2 Rosc. 739.) **424**

Duty of per-
sons driving
and walking.

A person is not liable for an unavoidable accident occasioned by his horses running away, where there was no negligence or want of ordinary ability on his part, or that of his servant. (*Holmes v. Mather*, L. R. 10 Ex. 261; *Manzoni v. Douglas*, 6 Q. B. D. 145.)

Horses run-
ning away.

425

Some accidents of themselves raise a presumption of negligence, so as to cast the burden on the defendant of proving an absence of negligence. (*Byrne v. Boodle*, 2 H. & C. 722.) **426**

Presumption
of negligence.

Where a railway crosses on a level a public road, and the gates across the public road are left open on the side of the line, and a person enters on that side, intending to cross as soon as a train passing on the other side should have passed, and he is knocked down by a train passing on the side on which he has entered, though he might have seen it coming if he had looked, the company are liable for negligence, inasmuch as it is the duty of the company, under the stats. 8 Vict. c. 20, s. 47, and 35 & 36 Vict. c. 18, s. 13, to keep the gates closed when trains are approaching; and the fact that the gates on one side were open was an intimation

Liability of
railway com-
panies for
accidents on a
level crossing.

PART I.
TIT. IV.
CHAP. II.

that the line on that side was safe. (*Wanless v. North Eastern Rail. Co.*, L. R. 6 Q. B. (Ex. Ch.) 481; 7 H. L. 12; *Smith v. South Eastern Rail. Co.*, (1896) 1 Q. B. 178.) **427**

Injuries to
the health.

It may here be added that redress may be had by action for injuries to the health of an individual, by the sale of bad wine, or provisions, or chemical preparations; by a nuisance, as the exercise of a noisome trade; or by the neglect or unskilful treatment of his medical attendant. (*Broom*, Com. 818-9; 3 Ste. Com. 414; *George v. Skirington*, L. R. 5 Ex. 1; *Heaven v. Pender*, 9 Q. B. D. 302.) **428**

Liability for
damage apart
from neg-
ligence.

There are certain cases in which a person is liable for an act which has resulted in damage to another, although there may have been no negligence on his part. Thus if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his peril. The maxim "*sic utere tuo ut alienum non laedas*" is here applicable. (*Fletcher v. Rylands*, L. R. 1 Ex. (Ex. Ch.) 265; affirmed, *Rylands v. Fletcher*, L. R. 3 H. L. 330— in this case a reservoir on the defendant's land burst through certain old mine workings into the plaintiff's mine.) **429**

Where by reason of an unprecedented rainfall a quantity of water accumulated against a railway embankment, and the railway company, to preserve their embankment, cut trenches in it, through which the water escaped on to the land of the plaintiff on a lower level, they were held liable, though they had not brought the water on their land, and there was no negligence on their part, as they had no right to protect their own property by transferring the mischief

to the plaintiff. (*Whalley v. Lancashire & Yorkshire Rail. Co.*, 13 Q. B. D. 131.) **430**

PART I.
TIT. IV.
CHAP. II.

But a man is not liable for an escape of water which injures his neighbour if the escape is caused by the act of God, or vis major, such as a storm, or an extraordinary rainfall (*Nichols v. Marsland*, L. R. 10 Ex. 255; 2 Ex. D. 1); nor where the immediate cause of the damage is the act of a stranger; nor where the artificial work which is the source of danger is maintained for the common benefit of the plaintiff and the defendant; nor where the defendant is acting in the performance of a legal duty, or in the exercise of powers specially conferred by law. (Pol. Torts, 444-6.) **431**

Exceptions to rule in
Fletcher v. Rylands.

A landowner is not liable for acts done in the natural user of his land (*Chasemore v. Richards*, 7 H. L. C. 349; *Bradford Corporation v. Pickles*, (1895) A. C. 587); and a landowner is not bound to cut thistles which grow on his land to prevent them from seeding, and thereby injuring his neighbour's. (*Giles v. Walker*, 24 Q. B. D. 656.) **432**

On the same principle, of the duty of extreme care in dealing with dangerous things, an owner of a locomotive is liable in damages if sparks escape therefrom in passing along a road, and injure or destroy a stack in an adjoining field. (*Powell v. Fall*, 5 Q. B. D. 597.) But railway companies authorized by the legislature to use locomotives are not responsible for damage caused by sparks escaping from the engine, unless negligence on their part be shown. (*Vaughan v. Taff Vale Rail. Co.*, 5 H. & N. 679.) Where, however, a railway company allowed a quantity of long dead grass dangerously to accumulate along their railway, and the sparks escaping from one of their engines set fire to the grass,

Natural user.

Sparks.

and the fire spread and consumed the plaintiff's cottage, the company were held liable for the damage done, on the ground of negligence. (*Smith v. London & North Western Rail. Co.*, 10 C.B. N.S. 89; Ad. Torts, 373-4; Pol. Torts, 407-9.) **433**

A person is not liable for the consequences of a fire accidentally beginning on his premises. (Ad. Torts, 371-2; 14 Geo. III. c. 78, s. 86.) But if a fire is negligently lighted or kept by a person or his servant, he will be liable for any injury thereby occasioned to his neighbour's premises. (2 Rose. 751; Ad. Torts, 371-3.) **434**

Contributory
negligence.

If, in an action for negligence, the defendant can prove that the damage to the plaintiff was brought about by the plaintiff's contributory negligence, the plaintiff will be unable to recover against the defendant. (*Butterfield v. Forrester*, 11 East, 60.) But the defendant must show that the negligence of the plaintiff was the proximate and decisive cause of the accident. Though the plaintiff may have been negligent, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him. (*Radley v. London & North Western Rail. Co.*, 1 App. Cas. 754.) **435**

Thus, where a pilot of a steamer in the Thames was sued for running down the plaintiff's barge, and the evidence showed that there was no look-out on the barge, but it was alleged that notwithstanding this the defendant could easily have cleared the barge, it was held that the proper question for the jury was, whether but for the negligence on the part of the plaintiff the misfortune would not have happened. (*Tuff v. War-*

man, 5 C. B. N. S. 585.) Negligence on the part of the plaintiff will not disentitle him to recover if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. (*Tuff v. Warman*, 5 C. B. N. S. 585; *Davies v. Munn*, 10 M. & W. 549; Pol. Torts, 412; Ad. Torts, 26.) **436**

PART I.
TIT. IV.
CHAP. II.

When a collision occurs between two vehicles, such collision being caused by negligence on both sides, neither party can recover damages; and it was at one time held that every passenger who had selected the particular conveyance by which he travelled was so far identified with the vehicle in which he had chosen to travel, that if an injury occurred through a collision with another vehicle caused by the joint negligence of those in control, the passenger could not sue the owners of the other vehicle. (*Thorogood v. Bryan*, 8 C. B. 131.) But this doctrine no longer holds good. (*The Bernina, Mills v. Armstrong*, 13 App. Cas. 1.) **437**

The exploded
doctrine of
identification.

PART II.
OF CONTRACTS.

TITLE I.

Of Contracts generally.

A PROMISE is an engagement by one person to another (or others), made by the former without any corresponding duty or obligation on the part of the latter. A promise by parol, i.e., either verbal or in writing, but not by deed, requires a consideration to support it. A promise by deed, which is usually termed a covenant, does not. (2 Ste. Com. 59-64; Chit. Con. 2.) **438**

PART II.
TIT. I.

Promise.

An agreement is an engagement by two or more persons with each other, by which such persons consent to undertake duties or obligations towards each other. A parol agreement, i.e., either verbal or in writing, but not by deed, requires a consideration to support it; but an agreement by deed does not. (2 Ste. Com. 59-64; Pol. Con. 1-3.) **439**

A contract is an agreement, promise, or obligation (a), express or implied, enforceable at law. (Chit. Con. 2; Pol. Con. 1.) **440**

Definition of
a contract.

A contract may be either unilateral, that is, binding upon one side only, or bilateral (or inter partes), that is, binding on both sides. (Ad. Con. 1-2, 13-4; Chit. Con. 16; Broom, Com. 300-1; *Great Northern Rail. Co. v. Witham*, L. R. 9 C. P. 16.) **441**

Unilateral
and bilateral
contracts.

(a) For a definition of obligation, see Pol. Con. 3.

PART II.
TIT. I.Express and
implied
contracts.

A contract may be either express or implied. An express contract is one the terms of which are expressed. An implied contract is one which the law, on principles of reason and justice, presumes. Thus, if a person sends to a shop for goods, or employs another, the law implies a contract by him to pay a reasonable sum for the goods, or the ordinary remuneration to him who is so employed. And so, on the loan of a horse, there is an implied contract by the borrower to feed him. Implied contracts also arise where there is no real contract at all, but an obligation quasi ex contractu. (Broom, Com. 245-7; 2 Ste. Com. 61-2, 415-6; Ad. Con. 22-4; and see Pol. Con. 10-13.) **442**

Executed and
executory
contracts.

A contract may be either executed or executory, or executed as to one of the parties, but executory as to the other. An executory contract is one in which a person binds himself to do or not to do a particular thing. An executed contract is one in which the main object of contract has been actually performed. (See Broom, Com. 244-5; 2 Ste. Com. 62-3.) **443**

Further
division of
contracts.

Again, contracts may be, 1. Contracts by matter of record; 2. Contracts under seal, which are termed specialties; 3. Contracts not under seal, which are called simple contracts. (Ad. Con. 2; Broom, Com. 255-6.) **444**

Contracts of
record.

Contracts by matter of record are contracts which are founded on the authority of a Court of Record. Unless judgments be regarded as contracts of record, as they are by some writers, contracts of record are seldom used, with the exception of recognizances. (Pol. Con. 141; Broom, Com. 256; Ad. Con. 21; Chit. Con. 2-3.) **445**

Cognovit.

A cognovit, a contract of record now obsolete, was a

written confession of an action supposed to be given by the defendant in Court, and authorizing the plaintiff, under certain circumstances, to enter up judgment and issue execution. It is superseded by an order for judgment by consent. (Broom, Com. 255.) **446**

PART II.
TIT. I.

A recognizance is an obligation of record, entered into, either to the Crown or a subject, before some Court of Record or magistrate duly authorized, with condition to do some particular act. (Broom, Com. 255; Wharton.) **447**

Recognizance.

A judgment awarding a sum of money to one of two litigants, either by way of damages or for costs, lays an obligation upon the other to pay the sum awarded. **448**

Judgment.

Contracts of record have this peculiarity, that they prove themselves, i.e., the bare production of the record is sufficient evidence of the existence of the contract. They require no consideration to render them binding. As soon as they are created the previously existing rights with which they deal merge, or are extinguished, in them. A right of action arising out of a judgment is barred if not exercised within twelve years. (Ad. Con. 21; Chit. Con. 4.) **448a**

Characteristics of contracts of record.

There is little of the true nature of a contract in the so-called contracts of record. Judgments are obligations depending, not on the consent of the parties, but on the sovereign authority. Recognizances are promises made to the sovereign, with whom the subject cannot contract. (Anson, 50-1.) **449**

A contract under seal is a written or printed contract sealed and delivered as a deed. Such a contract, unless operating in restraint of trade, requires no consideration to support it, as between the parties to it, if it is a deed

Contracts under seal. Their characteristics.

PART II.
TIT. I.

inter partes, or, as between the obligor and obligee, if it is a bond. It operates by way of estoppel. It creates a merger of an identical simple contract. And it can only be discharged at law by that which is of as high a nature as itself, that is, by a deed, or by a judicial or legislative act, but the rule is otherwise in equity, and by the operation of the Judicature Act, 1873, s. 25, sub-s. 11, the rule of equity now prevails. (Broom, Com. 263-96; Sm. Law of Prop., 6th ed., pars. 1812-14a, 1822-4; Chit. Con. 3-6; 44 & 45 Vict. c. 41, s. 59.) **449a**

The contract under seal is the only true formal contract of English law. (Anson, 52.) Some contracts must be under seal, such as transfers of shares in companies, contracts with corporations, and leases for more than three years. (Anson, 57.) **450**

Estoppel.

Estoppel is a rule of evidence, whereby a man is not allowed to disprove facts in the truth of which he has, by words or conduct, induced others to believe, knowing that they might or would act on such belief. **451**

Simple
contracts.

A simple contract is a contract by writing not under seal, or by word of mouth, or by implication from conduct. (Broom, Com. 296; Ad. Con. 2; Chit. Con. 6.) **452**

Their charac-
teristics.

Simple contracts, even though they be in writing, differ from contracts under seal in all these particulars: They do not create an estoppel, except in some few cases, though they operate as an admission, which serves as presumptive evidence. They require a consideration to support them. And they may be discharged without a deed, judgment, or Act of Parliament. A right of action arising out of a simple

contract is barred if not exercised within six years. (Chit. Con. 6-7; Ad. Con. 2.) **453**

PART II.
TIT. I.

If, after a simple contract security is given, a security by specialty between the same parties is given in relation to the same subject-matter, the right of action on the former becomes merged in the right of action on the latter, if the remedy by the latter is co-extensive with the remedy by the former, except, perhaps, where there is an intention expressed on the face of the deed that the previous security should remain in force. (Broom, Com. 273-5; Chit. Con. 6; Ad. Con. 176; *Sharpe v. Gibbs*, 16 C. B. (N. S.) 527; *Boaler v. Mayor*, 19 C. B. (N. S.) 76; *Commissioner of Stamps v. Hope*, (1891) A. C. 476.) **454**

Merger of
simple
contracts.

Although the word "parol" is often used to signify that which is oral, as opposed to that which is written, yet the expression "parol agreement" or "parol contract" is used to denote an agreement, whether written or verbal, which is not by specialty, that is, not by deed. (See Broom, Com. 368-9; 2 Ste. Com. 59; Chit. Con. 6.) **455**

Parol agree-
ment.

No particular form of words is necessary in a contract, whether it be verbal or written. So that an agreement may be inferred from mere words of recital, reference, exception, proviso, or condition. But in order to constitute the foundation of a legal right, the terms of a contract must be definitely and completely arranged; except that it is not essential in all cases to specify the time of delivery, the mode or time of payment, or even the price itself. (Pol. Con. 43-6; Broom, Com. 297.)

Requisites to
a contract.

Terms must
be definitely
settled.

456

The essential requisites of a simple contract are—(1) Offer and acceptance. (2) Consideration. (3) Legality of object. (4) Genuine consent between the parties;

Essential
requisites of
a simple
contract.

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TIT. I.

therefore there must be no mistake or fraud making the contract void. (5) Capacity of parties. Sometimes, as in the case of contracts under the Statute of Frauds, writing is necessary. (Chit. Con. 8.) **457**

Mutual assent
necessary.

As already intimated, in every contract, whether unilateral or inter partes, there must also be a mutual assent, express or implied; for a mere promise by one person for the benefit of another, without any assent or acceptance, is not a binding contract. And the assent must be to the same thing and to the precise terms offered; so that where one party makes a proposal, and the other accepts, subject to some variation or condition, the former is not bound by the acceptance. (Pol. Con. 39-43; Broom, Com. 300; Ad. Con. 1, 14-16; *Appleby v. Johnson*, L. R. 9 C. P. 158.) **458**

Rescission of
an offer.

An offer may be withdrawn at any time before it is completely and unconditionally accepted by words or by conduct, even though the person making it expressly gave the opposite party a certain time to consider whether he would accept it, unless additional consideration was given for keeping such offer open (*Cooke v. Oxley*, 3 T. R. 653), or unless the offer is made by deed (*Zenos v. Wickham*, L. R. 2 H. L. 296; *Roberts v. Security Co.*, (1897) 1 Q. B. 111). The withdrawal or revocation must be communicated to the other party, but such communication may be by conduct. On this point see *Dickinson v. Dodds* (2 Ch. D. 463). Dodds offered to sell Dickinson a horse, and to keep the offer open for two days. No consideration was received by Dodds for keeping the offer open. Before the two days expired Dodds sold the property to another person without notice to Dickinson. Dickinson heard of the sale, and at once gave notice to Dodds, within the two days, accepting the offer. It was held there was no

contract, as Dickinson knew that the offer had been withdrawn, and there was no obligation on Dodds to keep the offer open. (Anson, 32-6 ; Chit. Con. 10 ; 1 Rosc. 307.) **459**

PART II.
TIT. I.

The death of the proposer, before the proposal is accepted, operates as an absolute revocation of it, as it makes the proposed agreement impossible by the removal of a person whose consent is necessary. (Pol. Con. 37.) **460**

Death of
proposer.

An offer cannot be withdrawn after it is accepted. Silent consent does not amount to acceptance. (*Felt-house v. Bindley*, 11 C. B. N. S. 869.) An offer is accepted when the acceptance is communicated ; but it is not universally necessary that a communicated acceptance should come to the knowledge of the offeror in order to make a contract. (Anson, 21-2.) Thus, in *Carlill v. Carbolic Smoke Ball Co.*, (1893) 1 Q. B. 268, the defendant company offered, by advertisement, to pay 100*l.* to anyone who caught influenza, having used the smoke ball according to the printed directions. The plaintiff so used the ball, and caught influenza. The company was held liable to pay her the 100*l.*, as, in such a case, there need be no acceptance of the offer other than the performance of the condition. **461**

Acceptance
of offer.

An offer must be intended to create legal relations (not, e.g., an invitation to dinner). (Anson, 41.) **462**

The acceptance must be absolute and identical with the terms of the offer. **463**

An offer made by post invites an answer by post, unless the intention should be otherwise definitely expressed. The contract is complete as soon as a letter containing an acceptance of a proposal is posted, though it may never reach its destination ; and it would seem that it cannot be revoked, even by a telegram which reaches the

Contracts
by corre-
spondence.

PART II.
TIT. I.

offeror before the letter of acceptance. (*Dunlop v. Higgins*, 1 H. L. C. 381; *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216; *Henthorn v. Fraser*, (1892) 2 Ch. 27; *Broom*, Com. 299; Ad. Con. 17. And see Pol. Con. 31-8.) **464**

Where the contract must be in writing and signed, to be actionable.

By the 4th section of the Statute of Frauds, 29 Car. II. c. 3, no action shall be brought—(1) upon a promise by an executor or administrator to answer damages out of his own estate; or (2) upon any promise to answer for the debt, default, or miscarriage of another; or (3) upon an agreement made in consideration of marriage (which does not apply to promises to marry); or (4) upon a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or (5) upon any agreement not to be performed within the space of a year after the making thereof—unless the agreement upon which the action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized. (Pol. Con. 154-8; *Broom*, Com. 368-401; 1 *Rose*. 303; Ad. Con. 22-41; *Chit. Con.* 101-8.) **465**

Contract not actionable may be available in some cases.

Although no action can be brought on a contract falling within the 4th section of the Statute of Frauds, in case of non-compliance with its provisions, the statute does not make the contract void, but only voidable, and it may be available in some cases. Thus, (1) a money payment made in pursuance of it is good for all purposes; (2) the contract can be put into writing subsequently to the formation of the contract; (3) in the case of a contract as to the sale of land, or an interest therein, part performance may take the contract out of the Statute of Frauds, so that it may be enforceable in equity, although the provisions of the

Statute of Frauds have not been complied with; (4) writing is required as evidence of the contract, that is, the Statute of Frauds is a part of procedure law, not substantive law. (*Leroux v. Brown*, 12 C. B. 801; *Anson*, 68-70.) **466**

PART II.
TIT. I.

A proposal in writing, signed by the party to be charged, and accepted without writing by the party to whom it is made, is a sufficient memorandum or note of an agreement to satisfy the 4th section of the Statute of Frauds. But the acceptor must either perform, or be ready to perform, his part of the agreement before he can enforce performance by the party who has signed. (*Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. (Ap.) 314.) **467**

Requisites
of the
memorandum.

The signature may be in print, or may be written in ink, or in pencil, or, probably, may be stamped. (*Chit. Con.* 107.) **468**

Signature in
print, written
in ink or in
pencil, or
stamped.

If a person sanctions or adopts his written or printed name or signature, that is a sufficient signature by an agent duly authorized. (*Ad. Con.* 40; 1 *Rosc.* 308.) **469**

The consideration, as well as the names or a sufficient description of the parties, and the subject-matter of an agreement must appear by express terms in writing, or by necessary implication from a written instrument, in each of the five cases to which the 4th section of the Statute of Frauds relates, except the second case, namely, of a guarantee, in which, in consequence of another enactment, the consideration may be proved orally; and except that, if no price was agreed on, the law will infer that a reasonable price was to be paid. (*Broom, Com.* 375; *Ad. Con.* 35-8; *Chit. Con.* 105-6; 19 & 20 *Vict. c.* 97, s. 3; *Filby v. Hounsel*, (1896) 2 *Ch.* 737.) The agreement need not be contained in one written

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instrument, but may be in several documents, provided that the connection between them, and their meaning, appear on the face of the writings themselves, and can be made out without parol evidence, other than may be necessary to identify one document referred to in another. (Chit. Con. 105-6; *Boydell v. Drummond*, 11 East, 142; *Long v. Millar*, 4 C. P. D. (Ap.) 450; *Potter v. Peters*, 64 L. J. Ch. 357; *Oliver v. Hunting*, 44 Ch. D. 205; *Pearce v. Gardner*, (1897) 1 Q. B. 688.) **470**

The 4th clause of the 4th section of the Statute of Frauds applies to any agreement for or relating to the alienation of an interest in land. (See Broom, Com. 385-8; Ad. Con. 22-7; Chit. Con. 324-9.) But it does not apply to a distinct collateral agreement connected therewith. (*Angell v. Duke*, L. R. 10 Q. B. 174.) **471**

Part per-
formance in
Equity.

In the case of contracts concerning land, which would formerly have come within the jurisdiction of the Court of Chancery, part performance may take a contract out of the 4th section of the Statute of Frauds, so that it may be enforceable in Equity, although the provisions of the Statute of Frauds have not been complied with. (Chit. Con. 329-30; *Maddison v. Alderson*, 8 App. Cas. 467.) **472**

Executory contracts for the letting and hiring of furnished lodgings by the month, week, or day, are within this clause when specific rooms are taken. But an agreement to live at a boarding-house is not within the Statute of Frauds. (Ad. Con. 24.) **473**

A promise founded on a valuable consideration to make a will giving an interest in land is within the 4th section. (*Maddison v. Alderson*, 8 App. Cas. 467; *Humphreys v. Green*, 10 Q. B. D. (Ap.) 148.) Also a contract professing to give a right to kill game upon certain land, and take away a fourth of the game

killed, is a contract for an interest in land within that section. (*Webber v. Lee*, 9 Q. B. D. (Ap.) 315.)

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474

A contract for the sale of grass, wood, or fruit, as growing produce, is a contract for a sale of an interest concerning land. But a contract for the sale of grass, wood, or fruit, when severed, or by the terms of the contract intended to be at once or immediately severed, from the freehold, or of other produce not arising spontaneously, but by labour and industry, whether growing or severed (i.e. *fructus industriales*, or emblements), is not a contract for the sale of an interest concerning land, but is a sale of goods within the meaning of sect. 4 of the Sale of Goods Act, 1893. (Ad. Con. 26-7; Broom, Com. 388-91; 1 Rose. 303-4; *Marshall v. Green*, 1 C. P. D. 35.) And a contract for the use of a dock for the repair of a vessel, without excluding the possession and control of the dock owners, is not within the Act. (*Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.)

475

A contract for the sale of building materials, to be taken down and removed by the purchaser, is a contract for the sale of an interest concerning land. (*Lavery v. Purssell*, 39 Ch. D. 508.)

476

Tenants' fixtures are not an interest in land within the 4th section; nor are they goods and chattels within the 17th section. (*Lee v. Gaskell*, 1 Q. B. D. 700.)

477

By the 2nd section of the Statute of Frauds, leases for not more than three years, at a rent of not less than two-thirds of the improved value, are excepted from the 1st section, which requires leases to be in writing; but yet, in consequence of the 4th section, an *agreement* for

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such a lease cannot be enforced unless it is in writing.
(Ad. Con. 23, 41.) **478**

The last branch of the 4th section of the Statute of Frauds applies only to agreements that cannot be completely performed within the year, or are not on the face of them contemplated to be so performed. It does not apply to an agreement which may or may not happen to be performed within the year; nor to an agreement which is to be completely performed within the year by one of the parties, though not by the other; nor to an agreement for the payment of a yearly sum, in consideration of the performance of duty or service year by year (such as the maintenance of children) where such duty or service has been performed for a considerable period. (Ad. Con. 33-4; 1 Rose. 502-4; Chit. Con. 103-4; *Peter v. Compton*, 1 Sm. L. C. 303; *Britain v. Rossiter*, 11 Q. B. D. (Ap.) 123; *McGregor v. McGregor*, 21 Q. B. D. 424.) **479**

Lord Ten-
terden's Act.

By the statute, 9 Geo. IV. c. 14, s. 1, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise will take a case out of the Statute of Limitations (21 Jac. I. c. 16) unless made or contained by or in writing signed by the party chargeable thereby. But by the statute, 19 & 20 Vict. c. 97, s. 13, it is sufficient if the writing is signed by his agent duly authorized. (2 Ste. Com. 61; Chit. Con. 686, 691; Ad. Con. 193; 1 Rose. 651-4.) **480**

By the statute 9 Geo. IV. c. 14, s. 5, no action shall be maintained to charge any person, upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless by writing signed by the party to be charged thereby. (2 Ste. Com. 61; Chit. Con. 185; Ad. Con. 378-9.) And

now the protection to infants is further extended by the statute 37 & 38 Vict. c. 62, which supersedes this section. (See *infra*, par. 549 ; Ad. Con. 384.) **481**

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By the 4th section of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), a contract for the sale of goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. (Sub-s. 1.) This subsection contains the substance of sect. 17, now repealed, of the Statute of Frauds. (See later, pars. 712-4.)

482

A writing is also required in the case of grants of annuities (53 Geo. III. c. 141), and the sale or transfer of ships (57 & 58 Vict. c. 60, s. 24), and the sale or assignment of copyright. (Pol. Con. 161-2; Chit. Con. 99.) **483**

The assent to a substituted mode of performing one of the terms of a contract need not be in writing, though the original contract must have been in writing. (*Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140.) **484**

Verbal assent
to an
alteration.

In a simple contract, even though it be in writing, there must have been—1. A consideration moving from the contractee, or some one influenced by him, to the contractor. 2. A request to the contractee by the contractor to do, or induce some one else to do, the thing constituting the consideration. 3. A promise to the contractee, by the contractor, grounded on such consideration. (Broom, Com. 302-3; Chit. Con. 18; Ad. Con. 2, 14.) But as we shall presently see, the request and the promise are sometimes implied by the law.

Three
ingredients
in a simple
contract.

485

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TIT. I.

What
amounts to a
consideration.

A consideration capable of supporting a simple contract may consist of any benefit to the person making the promise, however slight, or to a third person, by the act of the promisee, or any loss, trouble, detriment, or inconvenience to, or charge or liability upon, the promisee, however slight, for the sake or at the instance of the promisor, though without any benefit to the promisor. The Courts of Law did not enter into the question of the adequacy of the consideration for a promise. (Broom, Com. 311; Ad. Con. 2-14; Pol. Con. 164-73; Chit. Con. 18-42.) Indeed, even in Equity, mere inadequacy of price, or any other inequality in the bargain, does not constitute by itself a ground to avoid it. Still, however, there may be such an unconscionableness or inadequacy in the bargain, as to shock the conscience, and amount to conclusive evidence of imposition or some undue influence; and in such a case, Courts of Equity would interfere on the ground of fraud. And where there are other ingredients of a suspicious nature, gross inadequacy must furnish the most vehement presumption of fraud. Also the consideration must be of *some* value, so that if it is false or a nullity, the contract is void both at Law and in Equity. (Ad. Con. 8; Broom, Com. 315; Anson, 81.) **486**

Prevention of litigation and settlement of disputes is a sufficient consideration. So that the suspension or forbearance of proceedings at Law or in Equity in respect of a legal or equitable claim, though it be only a doubtful one, and though, indeed, it ultimately turns out to be wholly unfounded, is a sufficient consideration for a promise, either by the party liable or by any third person, provided the claim was made *bonâ fide* in the belief that it was well founded, and not fraudulently

(Pol. Con. 179-81; Ad. Con. 10-11; Chit. Con. 24-6, 28-9; *Miles v. New Zealand Alford Estate Co.*, 32 Ch. D. (Ap.) 266.) **487**

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The consideration of natural affection or a mere moral consideration, however strong, is not such a consideration as will support a contract. (2 Ste. Com. 65; Ad. Con. 9, 10; Chit. Con. 29-32; *Eastwood v. Kenyon*, 11 A. & E. 438.) **488**

If a person promises to do, or does, that which he was previously bound to do, it is not a sufficient consideration for a promise made to him. And a promise by a creditor to accept less than the amount ascertained to be due, or to give time, is void, unless there is some new consideration. But if a creditor accepts a negotiable instrument in payment of a debt of a larger amount, this is a sufficient consideration for the release of the debt; for a negotiable instrument is something different to that which the creditor is entitled to demand. A composition with creditors appears at first sight to be an infraction of this rule, inasmuch as each creditor undertakes to accept a less sum than is due to him in satisfaction of a greater. But the consideration here is the promise by each of the other creditors that each will be content with a similar proportionate payment, if the others will forbear to ask for more. (Anson, 87-90; Chit. Con. 33-4; Pol. Con. 174-7; Ad. Con. 3, 4; see *Scotson v. Pegg*, 6 H. & N. 295; *Shadwell v. Shadwell*, 9 C. B. N. S. 159.) **489**

In reference to the consideration, there must be a privity, i.e., a connection as regards the transaction to which the contract relates, between the plaintiff or party charging and the defendant or party charged. So that the consideration must proceed from the party to whom the promise is made, or from a third person moved or

From whom
the considera-
tion must
move.

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affected by him; and no stranger to the consideration can sue upon the contract, although made for his benefit, and however nearly related he may be to the promisee from whom the consideration moved. And hence it has been held that where the consideration moves from a father, and the promise is made to the father, and the son is not a party to the contract, though it is made for his benefit, the natural love and affection between the father and son will not give the son the right to sue as if the consideration had proceeded from himself. (2 Ste. Com. 67; Broom, Com. 312, 315; *Tweddle v. Atkinson*, 1 B. & S. 393.)

490

Considerations executed, executory, contemporaneous, or continuing.

Considerations may be executed, or they may be executory, contemporaneous, or continuing. An executed consideration is one which has already taken place; an executory consideration is one which is to take place. A contemporaneous or concurrent consideration is one which is contemporaneous with a promise made in consequence of it, or one which arises where two persons simultaneously and reciprocally promise to do certain things, the promise of the one party being the consideration for the promise of the other; in which case the contract is perfected and made binding by the mere consent of the parties. A continuing consideration is one which, though commenced at a past time, continues to subsist at the date of the contract.

491

In the case of contracts made between adults, and founded upon mutual promises, mutuality of obligation is essential. **492**

Necessity for a request.

An executed or past consideration (*a*), in order to

(*a*) Some writers distinguish between executed and past consideration.

support an action, must be founded on a previous request, expressed or implied, to the contractee by the contractor, to do the act constituting the consideration; for it would not be right to place another under a legal obligation grounded on a mere gratuitous act. Thus, if a promise is made to pay the plaintiff a sum of money, in consideration of the plaintiff having formerly delivered some goods to the defendant, it is nudum pactum, unless the bygone consideration, the delivery of the goods, was the result of a request by the defendant to the plaintiff. (2 Ste. Com. 64; Chit. Con. 37; Ad. Con. 7.) **493**

Past consideration is really no consideration at all; but where services are done for a person, at his request, on the understanding that they are to be paid for, a subsequent promise to pay a fixed sum may be regarded as a part of the same transaction, defining the amount to be paid. (Anson, 93; *Lampleigh v. Braithwaite*, 1 Sm. L. C. 136; *Steward v. Casey*, (1892) 1 Ch. 115.) **494**

In the case of executory, contemporaneous and continuing considerations, a request is implied. (Broom, Com. 303-4, 321; 2 Ste. Com. 64-5.) **495**

Where the request or the promise is implied.

The cases of executed consideration in which a previous request is implied, are: 1. Cases in which the plaintiff or person charging has been compelled to do that which the defendant or person charged ought to have done, and was compellable to do. 2. Cases in which the defendant or person charged has taken the benefit of the consideration, or otherwise adopted the contract, as where a tradesman sends goods which have not been ordered, and the person to whom they have been sent keeps and uses them. 3. Cases in which the plaintiff or person charging has voluntarily done that

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which the defendant or person charged was compellable to do, and either the latter has afterwards expressly promised to repay or indemnify him, or the act done is one of such a nature that it is essential to the public welfare: as where a person voluntarily, but under circumstances which rendered it necessary, incurs reasonable expenses in burying a corpse. 4. Cases of money lent, as distinguished from cases of money disbursed for another without request. 5. And where one person for and at the request of another subjects himself to a legal liability to pay money, the law implies a request to the former by the latter actually to pay the money, when necessary. **496**

In the first two cases and the fourth, the law implies the promise as well as the request. And if one requests another to pay money for him to a stranger, in discharge of a debt due from him, or as a gift or loan from him, to such stranger, there is an implied undertaking to repay it, on the part of him who makes the request; so that, if the request is acceded to, the amount is a debt due to the person paying from the person at whose request it is paid. (Ad. Con. 7; Chit. Con. 38.) **497**

A debt barred by the Statute of Limitations is consideration for a subsequent promise to pay it. (Anson, 102-3.) **498**

Where the consideration will not support an express promise.

Where the law implies a certain promise from a consideration executed, such implied promise is deemed to exhaust the consideration; so that the consideration will not support any express promise in addition to the implied promise. Thus, on an account stated the law implies a promise to pay on request: and therefore the same consideration will not also support an express promise to pay at a future day. (Chit. Con. 39.) **499**

Illegal contracts.

With an exception (noticed *infra*, par. 525) in the

case of bills, notes, and mortgages for gaming debts, every contract, whether it be a contract by deed or a simple contract, is void, if it immediately grows out of an illegal act, or stipulates for the performance of an illegal act, or if it is founded upon an illegal consideration. So that even a deed which is good on the face of it may be avoided by adducing evidence of such illegality. (Broom, Com. 346; Ad. Con. 71-110.) **500**

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Unlawful or illegal contracts may be divided into, those contrary to positive law, those contrary to public morality recognized as such by law (immoral), and those contrary to the public welfare (against public policy). (Pol. Con. 261.) **501**

In the case of a promise to do several acts, some legal and others illegal, the contract is void as to the illegal acts only, if they are separable from the legal. But illegality in any part of the consideration or in one of the considerations renders the whole contract void. (Broom, Com. 348; Ad. Con. 106-8; Chit. Con. 559-60; *Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.)

502

Illegality is of two sorts—illegality of a statutory kind, and illegality by the unwritten law, whether Common Law or Equity. **503**

Contracts
contrary to
positive law.
Two kinds of
illegality.
Illegality by
statute.

A Court of justice will not carry out an illegal contract, (such, for instance, as a lottery) in any way; and, therefore, such a contract cannot be enforced by one party to it against the other, either directly, or indirectly by giving damages or compensation for the breach of it. (*Sykes v. Beadon*, 11 Ch. D. 170, 190, 193, 197.)

504

But the presumption of law is in favour of the legality of a contract, so that if the contract be reasonably susceptible of two interpretations, one legal and the other

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illegal, the first will be put upon it, and it will be supported; and the party who raises the defence of illegality must prove it clearly. (Chit. Con. 561.) **505**

The contract may be (1) illegal but not void, e. g., offences against the revenue; (2) illegal and void; (3) void only, e. g., ordinary wagers (as to which see pars. 515-21, below.) **506**

A great variety of dealings, of which contracts form part, are for various reasons forbidden or restricted by statute. When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if the conditions were imposed for general public purposes; not if for merely administrative purposes, e. g., collection of the revenue. (Pol. Con. 277-86.) **507**

Contracts
with medical
practitioners.

No person can recover any charges for medical or surgical aid, unless he proves at the trial that he was registered under the Medical Act at the time of the services rendered. (Ad. Con. 101-2; 21 & 22 Vict. c. 90, s. 32; amended 22 Vict. c. 21; 23 & 24 Vict. cc. 7, 66; 49 & 50 Vict. c. 48; *De la Rosa v. Prieto*, 16 C. B. (N. S.) 578; *Leman v. Houseley*, L. R. 10 Q. B. 66.) **508**

Contracts
with chemists
and druggists.

Chemists and druggists may prepare or dispense medicines, but cannot give advice or attend patients. (Ad. Con. 102; Chit. Con. 516.) **509**

Illegality by
the unwritten
law.

A contract which is illegal by the unwritten law is usually deemed so because it contemplates an indictable offence or civil wrong. An agreement to commit an assault has been held to be void. So, too, agreements involving the publication of a libel, or fraud upon creditors in view of bankruptcy, are void. (Anson, 195; 2 Ste. Com. 65-6.) **510**

The parties to contracts of immoral tendency cannot sue upon them. Thus, a print-seller cannot recover the price of obscene or libellous caricatures. A person cannot recover the rent of lodgings knowingly let, or the price of goods sold, for purposes of prostitution; as where an article of dress or a carriage is sold to a person known by the seller to be a prostitute, who intends to use it for display to attract men. Future illicit cohabitation is an illegal consideration, and a contract founded on it is void. Past cohabitation, though not an illegal consideration, is not a consideration on which a simple contract can be founded. (Pol. Con. 288; Ad. Con. 72-3; Chit. Con. 563-4; *Pearce v. Brooks*, L. R. 1 Ex. 213.) **511**

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Contracts of
immoral
tendency.

The doctrine of public policy, as affecting the validity of contracts, was at one time applied very frequently by the Courts, but modern decisions have tended to limit its operation. (Anson, 197.)

Agreements
contrary to
public policy.

The following contracts are void as contrary to public policy:—

- (1) Contracts to trade with the enemy.
- (2) Contracts, as a general rule, which have a tendency to interfere with the due administration of public justice, e.g., agreements to stifle prosecutions. But where civil and criminal remedies co-exist, a compromise of a prosecution is permissible. (*Windhill Local Board v. Vint*, 45 Ch. D. 351.)
- (3) Contracts which affect the freedom or security of marriage, such as marriage brokerage or brokerage contracts for procuring a marriage; contracts operating in general restraint of marriage; contracts for the prevention of cohabitation between man and wife; con-

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tracts respecting separation, unless it is actually existing at the time.

- (4) Contracts for the sale or transfer of certain public appointments.
- (5) Contracts which are inconsistent with public duties.
- (6) Contracts whereby a person who has no interest in a matter in litigation agrees to aid in it (which is called maintenance).
- (7) Contracts whereby a person who has no interest in a matter in litigation (or only a collateral interest: *Hutley v. Hutley*, L. R. 8 Q. B. 112), agrees, in consideration of a share of the fruits thereof, to render aid in regard to such litigation (which is called champerty).
- (8) Contracts in restraint of trade.
- (9) And all other contracts which are injurious to the public welfare. (See Pol. Con. 302; Ad. Con. 71-110; *Egerton v. Earl Brownlow*, 4 H. L. C. 1.) **512**

Contracts in
restraint of
trade.

Contracts in restraint of trade are contracts by which a man agrees not to carry on his business; for instance, after he has sold the goodwill thereof. As to these, it has been decided that a general restraint of trade is contrary to public policy, as it injures the contracting parties themselves and exposes the public to the dangers of a monopoly, but a contract in partial restraint will be upheld. At one time it was thought that a general restraint of space was void, but such a rule was inapplicable to the modern conditions of trade, and in the recent case of *The Maxim Nordenfeldt Co. v. Nordenfeldt* ((1893) 1 Ch. 630; (1894) A. C. 548), it was held—
(1) that a covenant by the defendant, on selling his business of a maker of guns to the company, not to

compete with the company in any business it might carry on, was in general restraint of trade and was void, but that it was distinct and severable from the rest of the contract; (2) that a covenant by the defendant not to carry on the business of a gunmaker anywhere for twenty-five years, although amounting to a general restraint of space, was legal, being reasonable between the parties and not injurious to the public interest. The nature of the business and the protection it requires must be looked at in each particular case. (Anson, 202-5.) **513**

A contract in restraint of trade, even though by deed, requires consideration. But the Court will not inquire into the adequacy of the consideration. **514**

As regards gaming contracts, it is enacted by the stat. 8 & 9 Vict. c. 109, s. 18, as follows:—"That all contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void: and that no suit shall be brought or maintained in any Court of Law or Equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." **515**

A wager is a contract in which A. engages to pay B. a sum of money in one case, uncertain or not ascertained; and B. engages to pay A. a sum of money in the opposite case. To constitute a wager there must be mutual chances of gain and loss. (*Carlill v. Carbolic*

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Smoke Ball Co., (1893) 1 Q. B. 268.) A wager may be a purely gambling or sporting transaction, or it may be directed to commercial objects (such as contracts of insurance). The latter is permitted by law. At Common Law all wagers were enforceable unless they offended against public policy. By the above statute gambling or sporting wagers are void, whether they relate to things lawful or unlawful in themselves. **516**

This enactment prevents the winner of a wager, even upon a lawful game, race, sport, pastime, or exercise, from recovering the money won from the loser. But, upon the same principle of the repudiation of such contracts by the policy of the law, any person may get back his own deposit on an illegal consideration, or on a wager of any kind, from a stakeholder, before the event, or even after the event, if it has not been paid over by him, or if it has been paid over to the winner after notice not to pay it over; and the same principle applies when one of the parties to the bet is himself the stakeholder. Thus, it has been held that securities, deposited with a broker as "cover" for the payment of differences upon any fall of stocks in speculative transactions concerning them, can be recovered; but that money deposited as cover, and appropriated by the broker to meet losses, before the person depositing has given notice to terminate the gambling transaction, cannot be recovered by the latter. (Ad. Con. 109-10; 1 Rose. 590; Pol. Con. 284-5; Chit. Con. 594-8; *Hampden v. Walsh*, 1 Q. B. D. 189; *Strachan v. Universal Stock Exchange* (No. 1), (1896) A. C. 166, affirming (1895) 2 Q. B. 329; *Strachan v. Universal Stock Exchange* (No. 2), (1895) 2 Q. B. 697; see also *O'Sullivan v. Thomas*, (1895) 1 Q. B. 698.) **517**

There is nothing illegal by the Common Law or by

the stat. 8 & 9 Vict. c. 109, s. 18, in a person employing a broker to speculate for him on the Stock Exchange, though he, to the knowledge of the broker, does not intend to accept the stock bought for him, or to deliver the stock sold for him, but expects the broker to so arrange matters that nothing but differences should be payable by him; but a mere gamble in differences cannot be enforced. (*Thacker v. Hardy*, 4 Q. B. D. (Ap.) 685; *Forget v. Ostigny*, (1895) A. C. 318.) **518**

Wagers being only void by 8 & 9 Vict. c. 109, and not illegal, transactions collateral to wagers were valid. Thus, money lent to make or to pay debts could be recovered; and if one man employed another to make bets for him the ordinary rules prevailed which govern the relation of employer and employed. (Anson, 191.) So, where a person employed a commission agent to make bets for him, and the bets were made and lost, it was held (prior to the Gaming Act, 1892), that the principal could not revoke the authority of the agent to pay the bets, the agent having an authority coupled with an interest, for if he had failed to pay the bets he would have been expelled from Tattersall's and lost his business as a turf commission agent; against such a risk his employer was bound to indemnify him. (*Read v. Anderson*, 13 Q. B. D. 779.) On the other hand, if the bets are won the agent was and is bound to pay over the winnings to his employer. (*Bridger v. Savage*, 15 Q. B. D. 363.) But an agent employed to make bets cannot be sued by his principal for failing to make them. (*Cohen v. Kittel*, 22 Q. B. D. 680.) **519**

The Gaming Act, 1892 (55 Vict. c. 9), enacts that—
“Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by

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8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto, or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." This Act, therefore, prohibits the recovery of money paid in discharge of the debts of another, whether this is done in virtue of a casual request or in pursuance of the contract of employment existing between a betting commissioner and the man on whose behalf he makes bets. (*Anson*, 191; *Tatam v. Reeve*, (1893) 1 Q. B. 44.) But a man may still recover money received on his behalf by the agent on account of bets made and won (*De Mattos v. Benjamin*, 63 L. J. Q. B. 248); and the Gaming Act of 1892 does not affect the liabilities of a stakeholder. (See par. 517 above; *Barclay v. Pearson*, (1893) 2 Ch. 154; *O'Sullivan v. Thomas*, (1895) 1 Q. B. 698; *Strachan v. Universal Stock Exchange* (No. 1), (1896) A. C. 166, affirming (1895) 2 Q. B. 329; *Strachan v. Universal Stock Exchange* (No. 2), (1895) 2 Q. B. 697.) **520**

Money lent to pay bets or stakes, on terms that it shall be repaid if the wager is won, cannot, since the Gaming Act, 1892, be recovered. (*Carney v. Plimmer*, (1897) 1 Q. B. 634.) **521**

Distinction
between void
and voidable
transactions,
as regards
confirmation.

Wherever any contract or conveyance is void, either by a positive law or upon principles of public policy, it is deemed incapable of confirmation; it being a maxim, *Quod ab initio non valet, in tractu temporis non convalescit*. But where it is merely voidable, or turns upon circumstances of undue advantage, surprise or imposition, there it is valid until it is rescinded; and if it is deliberately and upon full examination confirmed by the parties, it will be valid. (Pol. Con. 8, 9.)

522

Money paid under an executory illegal contract may be recovered before completion, in an action for money had and received, even though the parties are in *pari delicto*. Money paid under an executed illegal contract may be recovered back, when the two parties are not in *pari delicto*, and the party who paid the money is the more innocent of the two. But when both parties are in *pari delicto*, money paid cannot be recovered back; for the maxim is that “*In pari delicto, potior est conditio possidentis.*” (*Taylor v. Chester*, L. R. 4 Q. B. 309.) When a contract is void, though not illegal, money paid under it may in general be recovered back on the ground of failure of consideration. But where the purchaser has got the sort of thing he bargained for he cannot get back the price, though it may turn out of no value. (Ad. Con. 108-9; Pol. Con. 352-3; 1 Rose. 590.) **523**

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TIT. I.

Recovery of
money paid
under a
contract.

If the consideration is unlawful the contract is wholly bad. If some of the promises are good and some unlawful, and the contract is divisible, the good will be separated from the bad. If the purpose is unlawful to the knowledge of the parties, the contract is void; but if the parties do not intend the illegality, and the contract is legally performable, the contract is not void. (*Waugh v. Morris*, L. R. 8 Q. B. 202.) If the ulterior object is illegal to the knowledge of both parties the contract is bad. (*Pearce v. Brooks*, L. R. 1 Ex. 213.) But if the illegal object was known to one party only at the time of the contract, the innocent party can repudiate the contract. (*Cowan v. Milbourn*, L. R. 2 Ex. 230.) If the ulterior object is void only, collateral transactions are valid, save so far as the law has been altered by the Gaming Act, 1892 (55 Vict. c. 9). (See above par. 520; Anson, 206-13.) **524**

Effects of
illegality.

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TIT. I.

Securities for
money due
on illegal
transactions.

Securities under seal, if given for money due in respect of a prohibited transaction, are void (*Fisher v. Bridges*, 3 E. & B. 642); but if a security under seal is given for a merely void transaction it is binding. Negotiable instruments given as security for a void or illegal transaction are void as between the immediate parties. If the negotiable instrument was given for a merely void transaction, and has come into the hands of a subsequent holder, the latter is not bound to prove that he gave value therefor; but if given for an illegal transaction, or for money or valuables lost at any game within the meaning of 5 & 6 Will. IV. c. 41, a subsequent holder must prove that he gave consideration, and he has no title if he had notice of the illegality. (5 & 6 Will. IV. c. 41.) **525**

Genuine
consent.

A further requisite of a contract is genuineness or reality of consent. The contract may be rendered void or voidable by mistake, fraud, misrepresentation, duress, or undue influence. **526**

Mistake.

As a general rule, mistake does not of itself vitiate a contract, but it will do so in three cases :

1. Where the mistake is as to the nature of the transaction, arising from the fraud or carelessness of a third party. Thus, where an illiterate man was induced to execute a deed, which was described to him as a release of arrears of rent, but which was in fact a release of all claims, the deed was held to be void. (*Anson*, 130-2; *Thoroughgood's Case*, 2 Co. Rep. 9; *Foster v. Mackinnon*, L. R. 4 C. P. 711; *Henkel v. Pape*, L. R. 6 Ex. 7.)

2. Where the mistake is as to the identity of the person with whom the contract is made. Thus in *Boulton v. Jones* (2 H. & N. 564), Boulton took over the business of one Brocklehurst, with whom Jones used to deal, and

against whom he had a right of set-off. Jones sent an order, not knowing of the change, which Boulton executed. Jones refused to pay, and it was held he need not. Again in *Cundy v. Lindsay* (3 App. Cas. 459), a person named Blenkarn, by imitating the signature of a respectable firm named Blenkinson, induced Lindsay to supply him with goods. It was held that an innocent purchaser from Blenkarn acquired no right to the goods. This case is not affected by the Sale of Goods Act, 1893, sect. 23. (Anson, 132-4; Chalm. Sale, 54; see below par. 753.)

3. Where the mistake is as to the subject matter, in certain cases. Thus in *Raffles v. Wichelhaus* (2 H. & C. 906) the defendant agreed to buy from the plaintiff a cargo of cotton to arrive "ex Peerless from Bombay"; there were two ships of that name, both sailing from Bombay; Wichelhaus meant a Peerless which arrived in October; Raffles meant a Peerless which arrived in December. It was held there was no contract. (See also *Couturier v. Hastie*, 5 H. L. C. 673; *Smith v. Hughes*, L. R. 6 Q. B. 597; Anson, 134-42.)

The effect of mistake, when it has any effect at all, is to avoid the contract. (Anson, 141.) **527**

Fraud generally consists in the misrepresentation or Fraud. in the concealment of a material fact which is peculiarly within the knowledge of the party guilty of the fraud, or which is kept by artifice from the knowledge of the opposite party. And when a contract is founded in that sort of fraud of which the Courts take cognizance, it may be avoided, even at Law, by the party defrauded, if he disaffirms it as speedily as may be. But there are some species of artifice which, though moral frauds, are not frauds for which redress is given at Law or in Equity. (Broom, Com.

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327-39; Chit. Con. 581-91; Pol. Con. 534-41; Ad.
Con. 110-8.) **528**

Where there has been any fraudulent misrepresentation or wilful concealment by which a person has been induced to enter into a contract, he may be entitled to relief, notwithstanding he might have known the truth by proper inquiry. (*Venezuela Rail. Co. v. Kisch*, L. R. 2 H. L. 99, 120.) **529**

The essential feature of fraud is a false representation of fact, made with a knowledge of its falsity, or recklessly without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it. (Anson, 165; *Derry v. Peek*, 14 App. Cas. 337; *Peek v. Gurney*, L. R. 6 H. L. 409.) **530**

Where a person injured on a railway has executed a release to the company, in consideration of money paid to him, under the false representation, by an officer of the company, that his injuries were only of a trivial and temporary nature, he is not precluded by the release from suing the company, if his injuries turn out to be of a more serious nature than he anticipated. (*Hirschfield v. London, Brighton & S. C. Rail. Co.*, 2 Q. B. D. 1.) **531**

If directors issue debentures without authority from the company, and without power to do so, they are personally liable, as for a breach of warranty, to anyone who has paid money for such debentures on the faith of their being binding. (*Weeks v. Propert*, L. R. 8 C. P. 427.) **532**

If a falsehood is told, whereby a third person is prejudiced, although there may be no profit to the person who tells it, and no injury was intended to the party to whom it is told, but a benefit to a third person, it is

a fraud which will support an action of deceit. (Broom, Com. 334.) **533**

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And if a person who has no knowledge on the subject represents a certain state of facts to exist, with a view to secure some benefit to himself, or to deceive a third person, he is guilty of a fraud for which redress may be had, even at law. (Broom, Com. 335.) **534**

But fraud is not a ground of an action, unless it prejudiced the plaintiff; nor can it be set up as a defence, unless it induced the defendant to enter into the contract. (Broom, Com. 338; Ad. Con. 111-2.) **535**

A contract induced by fraud is not void, but only voidable at the option of the party defrauded; and though the party who was guilty of the fraud cannot enforce it, yet other persons, in consequence of it, may acquire interests and rights which they may enforce against the party defrauded. (Pol. Con. 535, 557; 56 & 57 Vict. c. 71, s. 24 (2); see below, par. 753; *Oakes v. Turquand*, L. R. 2 H. L. 325, 346; *Moyce v. Newington*, 4 Q. B. D. 32, 35; *Babcock v. Lawson*, *ibid.* 394; 5 Q. B. D. (Ap.) 284.) **536**

Apart from contract, the person injured by fraud has the common law action for deceit. (Anson, 175; see above, Part I. Tit. II. Chap. V.) **537**

In order to entitle a party to rescind a contract, it is sufficient to show that there was a fraudulent representation as to any part of that which induced him to enter into the contract. But when there has been only an innocent misrepresentation, it is not a ground for a rescission, unless it was such that there is a complete difference in substance between the thing bargained for and that obtained, so as to constitute a failure of consideration. Thus, where a horse is bought under a belief that it is

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sound, if the purchaser was induced to buy by a fraudulent representation as to the soundness of the horse, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both seller and buyer thought that they were dealing about a sound horse, and were in error, yet the buyer must pay the whole price unless there was a warranty; and even if there was a warranty, but no actual fraud on the part of the seller, the buyer can claim damages only, or set the breach of warranty up in reduction of the price; he cannot return the horse and claim back the whole price unless there were a condition to that effect in the contract. (Ad. Con. 111-2; 1 Rose. 317, 633-5; see below, pars. 732-4.) **538**

Contracts
uberrimæ
fidei.

There are some contracts in which more is required than the absence of misrepresentation or fraud. These are contracts in which one of the parties is presumed to have means of knowledge which are not accessible to the other, and is therefore bound to tell him anything which may be likely to affect his judgment. Such contracts are invalidated, even by non-disclosure of a material fact. Contracts of marine, fire, and life insurance, contracts for the sale of land, and for the allotment of shares in companies, are of the special class affected by non-disclosure. Suretyship and partnership are not contracts uberrimæ fidei until they have been actually entered into. (Anson, 157-62.)

539

Remedies for
misrepresentation.

Misrepresentation is a defence to an action on the contract, and entitles the injured party to rescind the contract; but it gives no right of action for damages except (1) when an agent is made liable for breach of warranty of authority; (2) under sect. 38, Companies

Act, 1867 (30 & 31 Vict. c. 131); (3) under Directors' Liability Act, 1890 (53 & 54 Vict. c. 64). (See above, par. 228.) **540**

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The fifth requisite of a contract is capacity to contract. (See par. 457, above.) **541**

The law presumes that everyone has a capacity to contract, except insane persons, infants, and, till recently, married women, who are under disability, either absolute or limited. Weakness of mind short of insanity, immaturity of reason in the case of an adult, or the want of experience and skill, is no ground for relief at Law or in Equity, if no fraud has been practised. (Chit. Con. 169-70.) **542**

Contracts by persons who are under disability.

Where a person is led to contract through fear of loss of life or limb, or of personal violence, or of being deprived of his liberty, or of being ill-treated when in lawful confinement, the contract is voidable by him, even at law. (Broom, Com. 705-6; Chit. Con. 170, 198-201; Ad. Con. 118.) **543**

Contracts by persons under duress.

In certain cases, especially where there is some relation of confidence between the parties, equity will set aside a contract on the ground of undue influence. (Anson, 178-83.) **544**

Undue influence.

Full age, in male or female, is twenty-one years; and it is completed on the morning of the day preceding the anniversary of a person's birth; so that a person born on the 1st of January, 1870, at any moment before midnight, would be of age on the 31st of December, 1890, immediately after midnight of the 30th. (2 Ste. Com. 305; Simpson, 3.) **545**

Full age.

All who are not of full age are legally designated as infants. **546**

Who are infants.

Before the stat. 37 & 38 Vict. c. 62, contracts to an infant's prejudice were void. Contracts which were

Contracts by infants.

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necessary and for his benefit were valid. Contracts which did not fall distinctly under these descriptions were voidable; these he might by confirmation, or, in some cases, such as continuing contracts, by mere acquiescence, after he became of age, render himself liable to perform. (2 Ste. Com. 306-9; Story's Eq. § 341; Burton, § 199; Ad. Con. 378-9.) Continuing contracts (such as leases and partnerships) were binding on the infant if on attaining his majority he did not disclaim them. On other contracts, such as ordinary trading transactions, he was only liable if on coming of age he ratified them. Lord Tenterden's Act (9 Geo. IV. c. 14), s. 5, enacted that such ratification must be in writing. (Pol. Con. 51-72; Ad. Con. 378; 1 Rose. 644; Chit. Con. 173-89.) **547**

Also, an infant could not bind himself by borrowing money even for necessities, nor by any contract connected with trade or mercantile contract, as by a bill or note, nor by a cognovit, nor by stating an account, nor by a bond in a penalty, even though each of these was for necessities. (Pol. Con. 70-1; 1 Rose. 643; Chit. Con. 183; *Soltykoff, Re, Ex parte Margrett*, (1891) 1 Q. B. 413.) **548**

Contracts by
infants,
except for
necessaries,
to be void.

And now by stat. 37 & 38 Vict. c. 62 (the Infants Relief Act, 1874), "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void: provided always, that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable" (s. 1). **549**

“No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age” (s. 2). **550**

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No action to be brought on ratification of infant's contract.

This Act applies to ratifications made after its passing, even of contracts made before that time. (*Ex parte Kibble, In re Onslow*, L. R. 10 Ch. Ap. 373.) It extends to mere ratifications of promises of marriage, however clear, without evidence of any fresh promise, though there may have been a ratification from day to day (*Coxhead v. Mullis*, 3 C. P. D. 439); but a fresh promise after full age will be binding (*Ditcham v. Worral*, 5 C. P. D. 410); and whether the facts amount to a promise or only a ratification after full age, is a question for the jury. (*Northcote v. Doughty*, 4 C. P. D. 385; *Holmes v. Brierley*, 36 W. R. 795; Pol. Con. 60-4.)

551

But the Act does not apply to contracts made by an infant for necessaries, or for his benefit, which are binding on him, nor to continuing contracts on which he is liable if he does not disclaim. (Anson, 109; *Carter v. Silber*, (1892) 2 Ch. 278; *Edwards v. Carter*, (1893) A. C. 360.) If an infant has paid money and taken benefit under the contract he cannot recover the money so paid. (*Valentini v. Canali*, 24 Q. B. D. 166; but see *Hamilton v. Vaughan Sherrin Electrical Engineering Co.*, (1894) 3 Ch. 589.) **552**

An adult who contracts with an infant is, although the infant is not, bound in case of a voidable contract just as before the Act. (Ad. Con. 380; Chit. Con. 188.)

552a

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TIT. I.

An infant, living under his parents' roof, is not ordinarily liable for the price even of necessities ordered by him, as the law assumes that these are provided for him. But if he is an orphan, or if he is residing at a distance from his parents, and is not provided with necessities by them, he may bind himself for necessities, such as food, apparel, medicine, and instruction for himself, his wife, and legitimate children, according to his station, so as to render him liable to pay a fair price or remuneration for them. The judge determines whether the things supplied can reasonably be considered necessities at all; and if he concludes that the question is an open one, he leaves it to the jury to say whether, under the circumstances of the case, the things supplied were necessities as a fact. (Ad. Con. 381-3; 2 Ste. Com. 308-9; Pol. Con. 66-72; Burton, § 199; 1 Rose. 642-3; Chit. Con. 175-6; *Ryder v. Wombwell*, L. R. 3 Ex. 90.) **553**

But if an infant is, at the time, well supplied with necessities, a tradesman cannot recover for more goods of the like kind which he has supplied to him, although the tradesman may be ignorant of the existing sufficient supply of the infant. (*Barnes v. Toye*, 13 Q. B. D. 410; *Johnstone v. Marks*, 19 Q. B. D. 509). **554**

Contracts for
benefit of
infant.

Contracts entered into by an infant which are for his benefit are binding on him. Such are contracts of apprenticeship, and with regard to labour, if such contracts are, when examined in all their terms, for the benefit of the infant. (*Corn v. Matthews*, (1893) 1 Q. B. 310; *Flower v. London and North Western Rail. Co.*, (1894) 2 Q. B. 65.) Where an infant had entered into a contract of service with a railway company, promising to accept the terms of an insurance against accidents in lieu of his rights of action under the Employers' Lia-

bility Act (43 & 44 Vict. c. 42), it was held that the contract was for his benefit, and that he was bound by his promise. (*Clements v. London and North Western Rail. Co.*, (1894) 3 Q. B. 482; *Anson*, 112.) **555**

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By the Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5, if a person, after he comes of age, agrees to pay any money contracted by him for bets or loans when he was an infant, such agreement and any instrument, even if negotiable, given for carrying into effect such agreement, is absolutely void. (*Chit. Con.* 186.) **556**

Betting
and Loans
(Infants)
Act, 1892.

The contract of a lunatic, whether executed or executory, is binding upon him, unless it can be shown that at the time of making the contract he was absolutely incapable of understanding what he was doing, and that the other party knew of his condition. (*Anson*, 120-1; *Ad. Con.* 405-6; *Broom, Com.* 700-4; *Imperial Loan Co. v. Stone*, (1892) 1 Q. B. 601.) A lunatic is liable on a contract for necessaries. (*Rhodes v. Rhodes*, 44 Ch. D. 94.) **557**

Contracts of
persons of un-
sound mind.

If a husband gives authority to his wife to act as his agent in pledging his credit, with the creditor's knowledge, and then the husband becomes lunatic, and the creditor supplies goods to the wife on the faith of such authority, though the authority is revoked by the lunacy, as between the husband and wife, yet if the creditor supplied the goods without notice of the lunacy, or the revocation of the authority, the husband is liable. (*Drew v. Nunn*, 4 Q. B. D. (Ap.) 661.) **558**

A person contracting whilst manifestly so intoxicated as not to know the consequences of his entering into the contract, is not liable, even though the contract is entered into by deed, unless it is for necessaries which were requisite for his preservation, or which he consumes

Contracts by
intoxicated
persons.

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or keeps after he becomes sober. (Broom, Com. 704-5 ; Ad. Con. 405 ; Chit. Con. 172.) But the contract of a drunken man is only voidable, and not void, and therefore the drunken man may, if he please, ratify it after he becomes sober. (*Matthews v. Baxter*, L. R. 8 Ex. 132.) **559**

Sale of Goods
Act, 1893.

The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2, provides that when necessities are sold and delivered to an infant, or to a person who by mental incapacity or drunkenness is incapable to contract, he must pay a reasonable price therefor ; and that necessities mean goods suitable to the condition of life of the infant, or other person, and to his actual requirements at the time of the sale and delivery. **560**

Contracts by
aliens or
persons domiciled in an
enemy's
country, or in
his service.

Alien friends may enter into contracts with British subjects, and may sue on such contracts in the Courts of this country, except that an alien cannot be owner of a British ship. (Chit. Con. 189-91 ; Ad. Con. 406-7 ; 33 Vict. c. 14 (a).) **561**

Unless, and except so far as, the stat. 33 Vict. c. 14 may be deemed to remove the disability of alien enemies, all contracts by alien enemies, *i.e.*, aliens whose government is at war with this country, unless they are resident here by licence of the Crown, and all contracts by British subjects and subjects of neutral powers, voluntarily domiciled in an enemy's country, or engaged in his service, unless they have a licence from the Crown to trade, are void, except that they may be sued upon their contracts, though they cannot sue. (Broom, Com. 707 ; Ad. Con. 407 ; Chit. Con. 189-91.) **562**

Contracts of

The contracts of foreign states, sovereigns, and their

(a) Before this Act, they could not acquire real estate or leaseholds, other than for twenty-one years, for the purposes of occupation or business. (See *Smith's Law of Property*, 6th ed. pars. 3349-63.)

representatives cannot be enforced against them unless they submit to the jurisdiction of the Courts of this country. (Anson, 107; *Mighell v. Sultan of Johore*, (1894) 1 Q. B. 149.) **563**

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foreign sove-
reigns, &c.

Outlaws and persons under sentence for felony are, for the time being, disabled from making or enforcing contracts, but are liable upon them. Contracts made previous to conviction can be enforced by an administrator appointed for the purpose by the Crown. (Broom, Com. 707; Ad. Con. 408; Chit. Con. 191-2; Anson, 107.) **564**

Contracts by
outlaws and
criminals.

There are certain limitations, necessary and express, upon the contractual capacity of corporations. (See below, Part II. Tit. II. Chap. V.) **565**

Contracts of
corporations.

In the view of the common law, the wife had no separate existence; she and her husband were in law but one person. And hence she had in general no power or capacity to contract during coverture, so as to render herself personally liable. To this, however, there were these exceptions: 1. A married woman might be a sole trader in the City of London, and she was recognisable as such in the City Courts: 2. If the husband was under sentence of transportation or penal servitude, or was an alien enemy, or if she was judicially separated and continued to live apart, she might contract and sue and be sued as a feme sole: and in these cases she might become a bankrupt: 3. She might make a valid contract with her husband as to their separation, and also a valid compromise of legal proceedings commenced by her against him. (Pol. Con. 76-83; Lush, 296-7.) **566**

Contracts of
married
women.

Incapacity of
the wife to
bind herself
by contract,
in view of the
common law.

Under the Divorce Act, 1857 (20 & 21 Vict. c. 85), s. 21, Divorce Act. a married woman, deserted by her husband, may obtain a protection order, protecting her earnings or property,

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acquired after such desertion, against her husband or any person claiming under him; and when a judicial separation has been obtained under the Act, the wife will be considered as a feme sole with respect to her property and for the purposes of contracts and torts, and suing and being sued. (Sects. 25-26.) **567**

Separate
estate.

The separate estate of a married woman has in various degrees in equity and by statute been treated as a property in respect of which, and to the extent of which, she can make contracts. The doctrine of separate estate arose in Chancery. Property might be held in trust for the separate use of a married woman. The Married Women's Property Acts of 1870 and 1874 specified various forms of property as the separate estate of married women, and thus constituted a new legal separate estate not vested in trustees; but the estate was limited in character. (Anson, 123.) **568**

Married
Women's
Property
Act, 1882.

The Married Women's Property Act of 1882 (45 & 46 Vict. c. 75) repeals the Acts of 1870 and 1874, and declares that all property acquired by a married woman on or after the 1st of January, 1883, including her earnings and property belonging to her at the time of her marriage, if on or after that date, is her separate property. In respect of and to the extent of her separate property, a married woman may enter into contracts, and render herself liable thereon, as if she were a feme sole. On such contracts she may sue and be sued alone. (Sect. 1, sub-ss. 1, 2.) **569**

Married
Women's
Property
Act, 1893.

It was held, on the Act of 1882, that the Court might draw inferences as to the intention of a married woman to bind, or not to bind, her separate estate (*Leek v. Driffild*, 24 Q. B. D. 98); and that the power of a married woman to bind her separate estate depended on the existence of such estate at the date of the contract.

(*Palliser v. Gurney*, 19 Q. B. D. 519.) But by the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), every contract made by a married woman since December 5th, 1893, binds her separate estate, and binds separate estate acquired after the contract was made, though she possessed none at the time of making the contract. (Anson, 124-5; Lush, 306-8.) **570**

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Property may be settled upon a married woman in trust, and she may be restrained from anticipation of property so settled and from rendering it liable in advance to satisfy her contracts. (Anson, 125; see *Hood-Barrs v. Heriot*, (1896) A. C. 174.) **571**

Restraint on
anticipation.

A married woman cannot be made a bankrupt or committed to prison under sect. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), for non-payment of a judgment debt contracted during coverture; but if she is trading separately from her husband, she can be made liable to the laws of bankruptcy. (45 & 46 Vict. c. 75, s. 1, sub-s. 5; *Scott v. Morley*, 20 Q. B. D. 120; *Pelton v. Harrison*, (1892) 1 Q. B. 121; *Robinson v. Lynes*, (1894) 2 Q. B. 577; *In re Hewett, Ex parte Lavene*, (1895) 1 Q. B. 328.) A married woman can be made bankrupt as to her separate estate although she has ceased to trade when the act of bankruptcy is committed. (*In re Dagnall, Ex parte Soan*, (1896) 2 Q. B. 407.) **572**

Unless there is evidence to the contrary, the usual presumption is that a wife who resides with her husband is authorized by him as his agent to bind him by contracting for necessaries, such as food, clothes, and furniture, according to the apparent circumstances of the husband and wife; but that a wife who is living separately from her husband has no such authority, unless the separation was by her husband's unjustifiable

Wife's power
to bind her
husband by
contract suit-
able to the
fortune and
degree of the
husband.

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compulsion, or occasioned by his misconduct, or by mutual consent, and she has no provision which is adequate for her support, or has been accepted by her as adequate, when the husband is responsible for necessities for her, and in some cases for his children living with her. (Lush, 321-95; 1 Rose. 540-4; Bright, 6-12; *Manby v. Scott*, 2 Sm. L. C. 433; *Montague v. Benedict*, 2 Sm. L. C. 463; *Seaton v. Benedict*, 2 Sm. L. C. 469; *Biffin v. Bignell*, 7 H. & N. 877; *Jolly v. Rees*, 15 C. B. (N. S.) 628; *Debenham v. Mellon*, 5 Q. B. D. (Ap.) 394; 6 App. Cas. 24.) **573**

Although a married woman, residing with her husband, has an implied authority from her husband to order food, clothing, furniture, and other necessary articles, yet, if her orders are of such a description as, under the circumstances, naturally to raise a doubt whether her husband would have authorized her to give them, the tradesman is bound to satisfy himself that they were so authorized. (1 Rose. 541; Lush, 354; *Lane v. Ironmonger*, 13 M. & W. 368.) **574**

A husband cannot be charged with goods supplied to his wife after a prohibition to the tradesman not to trust her, unless he has wrongfully turned her away, and the goods are necessary. And this need not always be an express prohibition communicated to the tradesman; a general prohibition to the wife against pledging his credit, of which no notice has been given to the tradesman, is sufficient, if there has been nothing in his previous conduct to induce the tradesman to suppose that she was authorized to pledge her husband's credit. (1 Rose. 541.) **575**

A husband who has supplied his wife, unknown to a tradesman, with an allowance to a certain extent, and has expressly forbidden her to pledge his credit, is not

liable for necessities, though the tradesman was not aware of such a prohibition, but, on the other hand, had no dealings with the wife with her husband's knowledge. (*Debenham v. Mellon*, 5 Q. B. D. (Ap.) 394; 6 App. Cas. 24.) **576**

The mere fact of marriage, or of residence together as husband and wife, does not imply a mandate in law, making the wife the agent in law of the husband to bind him, and to pledge his credit, except in case of necessity. (*Debenham v. Mellon*, 6 App. Cas. 24.) **577**

But if the husband has actually constituted his wife his agent, expressly or by conduct, he will be liable, on the general principles of agency, for any contracts she may make within the scope of her authority, and to deprive her of this authority he must give notice to those who deal with her. The insanity of the husband will not revoke her authority. (*Drew v. Nunn*, 4 Q. B. D. 661.) It has been held that his death, even although unknown to the wife or those who deal with her, will do so (*Blades v. Free*, 9 B. & C. 167); but it is doubtful whether this is still good law. (Ad. Con. 402; Lush, 326, 392.) If a wife deals with a person on the credit of her husband, and continues to do so after his death, but before notice of his death has been communicated, and makes no representation of her authority, she is not personally liable. (*Smout v. Ilbery*, 10 M. & W. 1.) **578**

As a married woman is now able to contract as if she were a feme sole, the question will arise whether credit was given to her as her husband's agent or not. (Ad. Con. 396; Lush, 323-5; 45 & 46 Vict. c. 75, s. 1, sub-s. 3.) **579**

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TIT. I.

Liability of a man for debts contracted by a woman held out to be his wife.

Where a man, whether married or single, allows a woman, to whom he is not married, to assume his name as his wife, or where he usually lives with her and treats her as if she were his wife, he is liable for debts contracted for necessities supplied to her or her order otherwise than on her own credit, even by a tradesman or other person who was aware of the fact that she was not his wife, if the debts were contracted during the continuance of the connexion, or even after it ceased, so long as the creditor who trusted to the supposed coverture or the connexion at the time it subsisted, was not aware of the subsequent separation. (Lush, 391; 1 Rose. 544.) **580**

Wife's liabilities before marriage.

Upon the marriage, before the stat. 33 & 34 Vict. c. 93, s. 12, the husband became liable to the wife's ante-nuptial contracts. But, on her death, his liability ceased, except as her administrator, unless judgment had been recovered against husband and wife in her lifetime. If he survived her, and took out administration, he was liable to be sued on them as his wife's administrator. If she survived him, her liability revived, in case nothing had been done to put an end to the contract, during the continuance of the marriage. (2 Bright, 1-3.) **581**

As regards liabilities incurred by women before marriage, the law seems now to stand thus :

1. In the case of women married before the passing of the stat. 33 & 34 Vict. c. 93, August 9th, 1870, the husband is liable, by the common law, for debts contracted by his wife before marriage. **582**

2. In the case of women married since August 9th, 1870, and before the passing of the stat. 37 & 38 Vict. c. 50, July 30th, 1874, the husband is not liable for such debts, but the wife is liable. **583**

3. In the case of women married since July 30th, 1874, the husband is liable, if jointly sued, for debts contracted by his wife before marriage, or for damages for any tort committed by her before marriage, or for the breach of any contract made by her before marriage, in respect and to the extent of certain specified property of the wife, or by reason and to the extent of a confession of liability by the husband, or (to the extent of the property of the wife) by reason of his not pleading exemption from liability. And the wife is liable jointly, so far as he is sued with her and is liable. And she is liable separately, so far as she is sued separately, or so far as he is not liable, if they are sued jointly. **584**

4. In the case of women married on or after the 1st of January, 1883, the husband and wife are respectively liable, in accordance with the provisions of the Married Women's Property Act, 1882, which confirms the above-mentioned liability, so far as consistent with its enactments (*a*); and the husband and wife may be sued together or separately. (Sm. Law of Prop. 6th ed. par. 3250; Lush, 270-85.) **585**

The result appears to be that the husband is made liable on the ante-nuptial contracts of his wife only to the extent of the property acquired through his wife; and subject to this, the wife is alone liable on such contracts, but her liability is limited to the amount of her separate estate (*a*). The husband is liable, even after his wife's death, for her ante-nuptial debts or torts to the extent of any property he had with her. **586**

The husband is still liable for all torts committed by the wife during the coverture, unless they are directly

Husband's
liability for
wife's torts.

(*a*) See 45 & 46 Vict. c. 75, ss. 13, 14, 15; and 56 & 57 Vict. c. 63.

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connected with contract by her, but the action must be against them both jointly. (Ad. Torts, 122; 2 Ste. Com. 277; Lush, 290; *Seroka v. Kattenberg*, 17 Q. B. D. 177.) **587**

Void, void-
able and un-
enforceable.

A contract is said to be void when it is destitute of legal effect; voidable, when it is capable of being affirmed or rejected at the option of one of the parties; unenforceable, when it is valid but incapable of proof until certain conditions are fulfilled. Thus, a contract may be void on the ground of mistake, or voidable on account of misrepresentation, or unenforceable because it fails to comply with the provisions of the Statute of Frauds or the Stamp Act or is barred by the Statute of Limitations. (Pol. Con. 8-10.) **588**

Stamps.

An instrument requiring a stamp is not receivable in evidence, for any purpose whatever, until it is stamped. It may be stamped at any time before it is produced for trial, unless expressly forbidden by statute, on payment of a penalty of £10, and of a further sum of £1 if paid in Court. Bills of lading and inland bills of exchange and promissory notes, in most cases, must be stamped before execution. (Chit. Con. 160; Pol. Con. 643; Ad. Con. 1215; Stamp Act, 1891 (54 & 55 Vict. c. 39).) **589**

An ordinary agreement in writing requires a stamp of 6*d.* The following agreements are exempted from stamp duty by the Stamp Act, 1891:—(1) An agreement the subject matter whereof is not of the value of £5. (2) An agreement for the hire of any labourer, artificer, or servant. (3) An agreement relating to the sale of any goods. (4) An agreement between master and mariners for wages from port to port in the United Kingdom. **590**

Motive or
animus in

In an action on contract, the motive or animus of the

defendant is immaterial, because the breach of the agreement renders the party guilty of it liable, ipso facto, for the direct pecuniary loss resulting therefrom, and the damages are limited to that. But sometimes, as for example in an action for breach of promise of marriage, the damages may be exemplary. (Broom, Com. 718-20.) **591**

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TIT. I.

cases of
breach of
contract.

As a general rule, prior to the Supreme Court of Judicature Act, 1873 (which came into operation on the 2nd day of November, 1875), a contract was not assignable at law. The instrument (if any) of contract, indeed, passed to the assignee, so that he might maintain an action for the recovery of the document, but the benefit of a contract could not be transferred at law so as to put the transferee in the place of the transferor, and entitle the transferee to maintain an action upon the contract in his own name; but the transferee might sue in the name of the transferor. Thus, if a bond were assigned, the assignee could not sue upon it (unless it was one of those bonds which the Legislature has excepted from the general rule); but he could sue in the name of the obligee. And if a personal chattel was assigned, the assignee could not sue on a covenant entered into by another person with the assignor respecting it. (Chit. Con. 727-8.) And the parties to a contract could not by express words confer on the assignee of the contract a right to sue in his own name; nor can they make it a negotiable instrument, so as to deprive the assignee of either the contract, or the property represented by it, of his right to take back his property from anyone to whom a thief may have transferred it, even though that transferee took it *bonâ fide* and for value. (*Crouch v. Credit*

Assignment
of a contract.

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TIT. I.

Enactment as
to assignment
of debts and
choses in
action, by
the Judica-
ture Act.

Foncier of England, L. R. 8 Q. B. 374, 380, 387.) But custom of merchants, if general, even though such custom is recent, can make a contract a negotiable instrument. (*Goodwin v. Roberts*, 1 App. Cas. 476.) Policies of life or marine assurance, however, were made assignable at Law. (See *infra*, Part II. Tit. II. Chap. IX.) Assignment of contracts was always allowed in Equity, and now, by the Supreme Court of Judicature Act, 1873, s. 25, clause (6), it is enacted that “Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts

for the relief of trustees." (Pol. Con. 204-12; *Tancred v. Delagoa Bay Co.*, 23 Q. B. D. 239; *Griffith v. Tower Publishing Co.*, (1897) 1 Ch. 21.) **592**

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In Equity there is still, therefore, a wider right of assignment than at common law; for in Equity the assignment need not be absolute, but may be by way of charge or mortgage, and the notice of the assignment, though it must be express, need not be in writing. **593**

Executors and administrators represent the testator or intestate, and are the persons entitled to sue upon all bonds and personal covenants and simple contracts entered into with the testator or intestate; and are entitled to all damages which accrued to the testator or intestate in his lifetime, and, in general, to the benefit of all duties owing to the testator or intestate. (1 Pres. Shep. T. 175; 2 Wms. Ex. 1773-4; *Stubbs v. Holywell Rail. Co.*, L. R. 2 Ex. 311.) **594**

Rights of executors or administrators to damages, covenants, or duties.

Executors or administrators are responsible to the extent of the assets come to their hands, upon all contracts of their testator or intestate, even where they are not named in the contract. (2 Wms. Ex. 1595; Sm. Law of Prop. 6th ed. par. 1814.) **595**

Liability of representatives in matters of contract.

Executors or administrators, however, are not entitled to the benefit of, or subject to liability on, executory contracts which are so strictly personal to their testator or intestate that the nature of the case requires that such contracts, and all liability and benefit attaching thereto, should die with him; as in the case of contracts by authors to write a book; contracts by medical men to cure a patient; promises of marriage, &c. (2 Wms. Ex. 1596-7; see *Stubbs v. Holywell Rail. Co.*, L. R. 2 Ex. 311; *Finlay v. Chirney*, 20 Q. B. D. 494.) **596**

Contracts which do not survive.

An executor or administrator is personally liable for money lent to or received by him, or for orders for the

Where executor or administrator is

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TIT. I.personally
liable.

funeral given by him, or for other work performed for him, or goods sold and delivered to him. An executor is also personally liable on a covenant to repair in a lease entered into by the testator or intestate. (Chit. Con. 314; 2 Wms. Ex. 1664-5, 1677-8.) **597**

Orders for a
funeral.

Where a person, in a case of necessity, gives reasonable orders for a funeral, in consequence of the neglect of the executor or other party who was bound to give such orders, such person makes himself personally responsible to those to whom he gives such orders. But he is entitled to reimbursement of the reasonable expenses of the funeral, by the executor or other party, if such executor or other party have assets. (See Wms. Ex. 1679; 1 Rose. 572; Chit. Con. 44.) **598**

General rules
as to the way
in which a
contract
ought to be
evidenced and
construed.

When an agreement has been put into writing, it must be proved by the writing alone, or by that and any other connected with it so far as it appears to be a complete contract, without reference to any prior or contemporaneous verbal expressions which would alter, add to, or take away from its import, or show its meaning to be different from what its words import. But so far as on the face of it the contract is incomplete in some particular of price, time of delivery, &c., its deficiency may be supplied by parol evidence, unless that would be contrary to a statute. And a distinct collateral verbal agreement between the parties prior to or contemporaneously with the written agreement, and connected and not inconsistent with it, may be enforced, if otherwise valid. (Broom, Com. 369, 573; Ad. Con. 43-5, 60-70; Pol. Con. 494-8; 1 Rose. 16-33; Chit. Con. 132-44.) **599**

An executory agreement not under seal may be shown to have been subsequently waived, annulled, added to, or varied, even verbally, where a writing was

not necessary in the first instance. But where by statute a written contract is necessary, the whole of the contract must be in writing; so that written contracts made pursuant to a statute cannot afterwards be varied or added to by word of mouth. And a deed cannot at common law be revoked or discharged except by deed. (Broom, Com. 370; Ad. Con. 63; Chit. Con. 141; *Noble v. Ward*, L. R. 1 Ex. 117; 2 Ex. (Ex. Ch.) 135.) **600**

In the case of patent ambiguity, *i.e.*, an ambiguity apparent on the words themselves, no parol evidence is admissible to remove it. But in the case of a latent ambiguity, *i.e.*, an ambiguity which lies concealed, but is made to appear by parol evidence, such evidence is admissible to explain it, as well as to raise it; as when it appears that there are two persons or things of the same name. (Broom, Com. 574-6; 1 Rose. 29-33; Chit. Con. 136-7; Ad. Con. 44-6.) **601**

In many cases, even at law, extrinsic evidence may be resorted to; either in support of deeds, by showing a sufficient consideration, if not inconsistent with the deed; or by way of defence against written instruments, when obtained by duress, menace, fraud, illegality, or mistake. (1 Rose. 19, 21; Chit. Con. 143-4; Ad. Con. 18; Pol. Con. 358.) **602**

Where parties have contracted with reference to some established usage known to them, the contract is construed with reference to such usage so long as it is not inconsistent with the express language of the written contract. (Ad. Con. 65; 1 Rose. 22-8; Chit. Con. 142; *Hayton v. Irwin*, 5 C. P. D. (Ap.) 130.) And the meaning of the words used may be explained by evidence where they are terms of business, art, or science, or where, though they may be words in general use,

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they have a peculiar signification among a particular class of persons as well as a popular meaning (Ad. Con. 66-7; *Myers v. Sarl*, 3 Ell. & Ell. 306); *Smith v. Wilson*, 3 B. & A. 728—where parol evidence was admitted to prove that “one thousand rabbits” by local custom meant twelve hundred). Extrinsic evidence may also be resorted to for the purpose of annexing to a written contract that which constitutes an ordinary incident (according to common sense, or by the common law, or by the usage of trade, or by the custom of the country, of which the parties may be presumed to have been cognizant), provided it is not inconsistent with the terms of the written instrument. (Broom, Com. 583; Ad. Con. 65-6; Chit. Con. 138-9.) **603**

A usage may be of such a peculiar nature, that parties may not be liable under it, unless it was known to them at the time of the contract. (*Robinson v. Mollett*, L. R. 7 H. L. 802.) **604**

The existence of a usage, peculiar meaning, or incident, is matter of fact for the jury (if any), and must be established by clear and positive proof, either written or oral, and not by mere opinions of witnesses; and it is also for the jury to say whether the parties contracted with reference to such usage, meaning, or incident. But when such usage, meaning or incident, and the contracting with reference to it, are so ascertained by the jury, the construction of the instrument, in these as in other cases, belongs to the judge. (Broom, Com. 588-91; Ad. Con. 67; Chit. Con. 126; 1 Rosc. 18; *Bowes v. Shand*, 2 App. Cas. 455.) **605**

All written contracts, whether under seal or not, ought to be construed favourably, so as to support and effectuate the apparent intention of the parties, as far as possible, consistently with the rules of law. The intention, how-

ever, must not be imputed by mere conjecture, but (subject to the preceding remarks) it must be collected from the instrument itself; and in general no construction is to be made contrary to the words; and the words are generally to be construed in their ordinary and proper sense, where they are capable of being carried into effect in that sense, unless from the context or the surrounding circumstances it is plain that the parties intended to use them in some other sense. And if the words are susceptible of two senses, the sense which is agreeable to law is to be preferred to that which is contrary to law, and the sense which is the most reasonable to that which is less reasonable. And the construction should be made not merely upon particular words or parts, but upon the entire instrument, so as to give effect, if possible, to every part and every word, as well as to the evident object and intent, without violence to any word or part; though, if necessary, the words may be transposed, or their grammatical construction disregarded, or a part totally repugnant to the general intent may be controlled or rejected. Words are construed most strongly against the person using them. (Ad. Con. 43-4; Chit. Con. 109-30; Anson, 269.)

606

Recourse may be had to the recitals to explain doubtful words in the operative part of a deed or agreement, but not to control clear and unambiguous words in the operative part. (Chit. Con. 120; Sm. Law of Prop. 6th ed. par. 1742.) **607**

Effect of
recitals.

An erroneous addition will not vitiate prior adequate designation or description. *Falsa demonstratio non nocet*. (Chit. Con. 121; Sm. Law of Prop. 6th ed. par. 1754.) **607a**

Erroneous
addition.

Of two totally repugnant clauses, the former is to be Repugnancy.

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received, and the latter rejected. (Chit. Con. 124; Sm. Law of Prop. 6th ed. par. 2519.) **608**

Contracts made in one country to be performed or enforced in another.

Contracts made in one country concerning real property in another, are to be interpreted according to the law of the country in which the property is situate. But a contract concerning personalty is generally to be governed by the law of the country where the contract is made, as regards its nature, obligation, and effect; and by the law of the country where the contract is to be performed, as regards the performance of it; and by the law of the country where the contract is to be enforced, as regards the proceedings for enforcing it. (Ad. Con. 55-60; Chit. Con. 124-8. And as to bills and notes, see 45 & 46 Vict. c. 61.) **609**

Joint or several contracts.

If two or more persons bind themselves to do an act, there, in the absence of words or reasons to the contrary, the general rule is, that they are bound jointly, and not severally. But even though the agreement be *primâ facie* joint, it may be construed to be several, if the interest of either party appearing on the face of the instrument requires it. And, on the other hand, even though the agreement be *primâ facie* several, yet if ambiguous, it will be construed to be joint, if the interest be joint. (Chit. Con. 130-1; Ad. Con. 300-2.) **610**

Time for performance.

Where no time is fixed, a contract must be performed within a reasonable time. (Chit. Con. 608; Ad. Con. 125.) **611**

Where time is of the essence of the contract.

Prior to the Supreme Court of Judicature Act, 1873, the time appointed for the doing of a single act was generally of the essence of the contract at law, but in equity it would depend on the real intention of the parties. (Pol. Con. 486.) But even where time was not originally of the essence of the contract, on either party being guilty of delay, a notice in writing by the

other that he shall consider the contract at an end if it be not completed within a named period (a reasonable time for its completion), will be binding on the party receiving the notice. (Ad. Con. 126 ; Pol. Con. 488.) By that Act, sect. 25, clause (7), it is enacted that "Stipulations in contract, as to time or otherwise, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all Courts the same construction and effect as they would have heretofore received in Equity." **612**

In the absence of express stipulation, or of any particular reason for it, a request or a demand of performance is not necessary. (Chit. Con. 613 ; Ad. Con. 128-9.) **613**

Demand of
performance.

Where, on breach of an agreement, an ascertained sum is to be paid, that sum, together with interest, when recoverable, will be the measure of damages, unless the circumstances are such as to lead the Court to the conclusion that such a sum is really a penalty, in which case the amount recoverable will not be the sum named, but the damage actually sustained. The construction of the agreement will not depend on the name given in it to the sum. The following are rules for ascertaining whether a sum agreed upon is a penalty or liquidated damages :—(1) If the contract is for a matter of uncertain value, and a fixed sum is to be paid for the breach of one or more of its provisions, the sum may be recovered as liquidated damages. (2) If the contract is for a matter of certain value, and, on breach of it, a sum in excess of that value is to be paid, this is a penalty, and not liquidated damages. (3) If the contract contains a number of terms, some of which are of certain and some uncertain value, and a fixed sum is to

Penalties and
liquidated
damages.

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be paid for the breach of any one of them, this is a penalty. (Anson, 270 ; Ad. Con. 267-72 ; Mayne, 142-55 ; *Willson v. Lore*, (1896) 1 Q. B. 626.) **614**

Discharge of
contract.

A contract may be discharged—(1) by mutual agreement ; (2) by performance ; (3) by breach—a new obligation then connects the parties, the person aggrieved having a right of action against the other ; (4) by becoming impossible ; (5) by operation of law. (Anson, 272.) **615**

Discharge by
mutual
agreement.

Discharge by mutual agreement may be by waiver ; by substitution of a new contract for the old one ; by express or implied provisions in the contract itself for its determination under certain circumstances. (Anson, 273-81.) **616**

Rescinding,
discharging,
or dispensing
with a
contract.

A gratuitous promise may be revoked, so long as nothing has been done on the faith of it. But in general a contract based on a good consideration cannot be rescinded, except by the consent of both parties, unless it is tainted by fraud. Where it may be rescinded by one party it can only be rescinded within a reasonable time, and by a party who is in no default, and provided both parties can be placed in their original position. (Chit. Con. 623-4 ; Ad. Con. 3, 156-7.) **617**

We have seen that a contract under seal can only be discharged by a deed or by a judicial or legislative act. But a parol contract, even in writing, may, before breach of it, be discharged, or the performance of it, or any part of it, may be dispensed with by a subsequent verbal agreement. But after breach, the contract, though it be only verbal, and the liability of the promissor thereon, cannot be discharged, except by a deed or by accord and satisfaction. (Ad. Con. 157-8 ; Chit. Con. 652-3.) **618**

Bills of exchange and promissory notes might for-

merly be discharged by renunciation by word of mouth only, but now the renunciation must be in writing, unless the bill or note be given up. (45 & 46 Vict. c. 61, s. 62.) **619**

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It has been held that where the subsequent agreement, if it had been an original agreement, would have been required by the Statute of Frauds to have been in writing, it cannot operate, if it is not in writing, even as a rescission of the original agreement. (*Noble v. Ward*, L. R. 1 Ex. 117; 2 Ex. (Ex. Ch.) 135; Pol. Con. 639.) **620**

A contract is said to be discharged by performance when—(1) all has been done on both sides that could be required to be done under the contract; (2) payment of money is accepted in performance of the original or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which has arisen from the breach of a contract; (3) tender of payment or of delivery is made. (Anson, 282-5.) **621**

Discharge by
performance.

A debtor who sends his creditor a cheque by post does so at his own risk, unless it is sent at the request, actual or implied, of the creditor. If the cheque is stolen before it reaches the creditor, and is cashed by the thief, the debtor will have to pay over again. The fact that there has been a long course of dealing between the parties, during which the debtor has always paid by cheque sent through the post, does not by itself amount to an implied request by the creditor that payment should be made in that manner. (*Pennington v. Crossley and Sons*, 13 T. L. R. 573.) **621a**

Payment.

Tender is attempted performance. If in a contract for the sale of goods, the seller satisfies all the requirements of the contract as to delivery, and the purchaser

Tender.

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nevertheless refuses to accept the goods, the seller is discharged. If the performance due consists in the payment of money, a tender by the debtor does not discharge the debt; but if the debtor continues ready to pay the debt, then, when sued upon it, he can pay the money into Court and plead that he tendered the money. If in the event the plaintiff recovers no more than the money tendered to him, the defendant gets judgment for the costs of his defence. Tender, to be a valid performance to this extent, must be absolute and unconditional, and of money or bank notes produced and accessible to the creditor, not necessarily of the exact sum, but of such a sum that the creditor can take what is due without being called upon to give change. Bank of England notes are a good tender for all sums above 5*l.*, so long as the Bank continues to pay its notes on demand in legal coin; but the Bank cannot make a legal tender in its own notes to a person requiring gold. Gold coin is legal tender for payment of any amount. Silver coin to amount of 40*s.* Bronze to amount of 12*d.* (Anson, 284-5.) **622**

Discharge by
breach.

A contract is discharged by breach when one party (1) renounces his liabilities under it; (2) by his own act makes it impossible that he should fulfil his liabilities; (3) fails wholly or partially to perform what he has promised. (Anson, 289.) **623**

Anticipatory
breach of
contract.

When a party wrongfully repudiates his contract before the time for its performance by him, and thus commits a breach of contract by anticipation, the other party may forthwith bring an action for damages for breach of contract, if the circumstances are such that he can, and does, elect to treat the repudiation as putting an end to the contract, except for the purposes of his action. (*Hochster v. Delatour*, 2 E. & B. 678; *Avery v.*

Bowden, 5 E. & B. 714; *Cort v. Ambergate Rail. Co.*, 17 Q. B. 127; *Johnstone v. Milling*, 16 Q. B. D. 460; *Synge v. Synge*, (1894) 1 Q. B. 466; *O'Neil v. Armstrong*, (1895) 2 Q. B. 70.) **624**

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Where one party has done a part, though not all, that he is bound to do under the contract, and the other party commits a breach which amounts to a discharge, the party not in fault is entitled to sue, not only on the special contract, but also, if what he has done can be represented in a claim for money payment, for a quantum meruit, or the value of so much as he has done. (Anson, 288.) **625**

Quantum
meruit.

Whether upon breach by renunciation by one party, or by total or partial failure of any party to perform the contract, the other party is entitled to repudiate the contract, is a question of fact. He would be so entitled (1.) If the opposite party refuses or fails to perform his part of the contract, in the case of his performance being a condition precedent. (2.) Where the contract is based on the supposed existence of a certain state of things, as a condition precedent, and it is found not to exist. (3.) In the case of covenants or stipulations founded on a mutual obligation. But where one party has taken the benefit, in a substantial manner, of the contract, he cannot repudiate the contract on account of a failure of a part, though an important part of the consideration. And in the case of independent mutual contracts, each party has his remedy on the promise of the other, without performing his own promise. (Chit. Con. 614-23; Ad. Con. 131-5, 155-6; *Boast v. Firth*, L. R. 4 C. P. 1; *Simpson v. Crippin*, L. R. 8 Q. B. 14; *Honck v. Muller*, 7 Q. B. D. 92; *Bettini v. Gye*, 1 Q. B. D. 183; *Behn v. Burness*, 3 B. & S. 756; *Pust v. Dowie*, 32 L. J. Q. B. 179.) **626**

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TIT. I.Remedies for
breach of
contract.

The remedies open to a person who is injured by the breach of a contract made with him are of two kinds; he may seek to obtain damages for the loss he has sustained, or he may seek to obtain a decree for specific performance, or an injunction, to enforce the promised acts or forbearances of the other party. (Anson, 308.)

627

Damages.

As to the amount of damages recoverable, this will be in most cases the damages naturally and obviously flowing from the breach. (*Hadley v. Baxendale*, 9 Ex. 341; see below, Part III. Tit. I. Chap. I.) **628**

Specific
performance.

Specific performance will be granted when damages are not an adequate remedy, e.g., in the case of sales of land, or of chattels possessing a special beauty, rarity, or interest. (Anson, 312; and see 56 & 57 Viet. c. 71, s. 52, par. 791 below.) **629**

Discharge of
right of
action arising
from breach.

The right of action arising from a breach of contract can be discharged. 1. By the consent of the parties, e.g., by release, or accord and satisfaction. (See below, pars. 1299, 1308-10.) 2. By judgment of the Court in plaintiff's favour, which merges the right of action arising on breach in the new contract of record. 3. By lapse of time. (See below, Part III. Tit. I. Chap. II.)

630Impossibility
of perform-
ance.

With regard to the cases where performance is excused on the ground of impossibility: First, where the performance depends on the continued existence of a person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing without the fault of the contractor, shall excuse the performance. (*Taylor v. Caldwell*, 3 B. & S. 826, 839; *Appleby v. Myers*, L. R. 2 C. P. (Ex. Ch.) 651; *Turner v. Goldsmith*, (1891) 1 Q. B. 544.) Secondly, non-performance is excused, if the thing contracted to be done is antecedently impossible, or becomes impos-

sible by the act or default of the promisee, or by the act of God, or of the law, or of public authority: as where a pianist engages to play, but is prevented by illness (*Robinson v. Davison*, L. R. 6 Ex. 269); or where a person agrees to sell the whole or a part of a specific crop to be grown on specified land, and the crop on that land fails, without any fault of the vendor (*Howell v. Coupland*, 1 Q. B. D. (Ap.) 258); and now by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7, an agreement to sell specific goods is avoided if, before the risk has passed to the buyer, by fault of neither party, the goods perish. But it is not excused by any other subsequent impossibility of performing the thing contracted to be done. (*Budgett v. Binnington*, (1891) 1 Q. B. 35.) Thirdly, unless there is an express or implied stipulation to the contrary, there is an implied condition, in contracts for personal services, that the death of either shall dissolve the contract. (*Farrow v. Wilson*, L. R. 4 C. P. 744.) **631**

Non-performance is excused and, indeed, justified if the contract is illegal. (*Cowan v. Milbourn*, L. R. 2 Ex. 230.) **632**

A contract may be discharged by act of law by—
 1. Merger; thus, if two parties to a simple contract embody its contents in a deed which they both execute, the simple contract is thereby discharged. 2. In the case of a deed or contract in writing, by material alteration without consent of the other party. (*Pigot's Case*, 11 Co. Rep. 27; see, however, 45 & 46 Vict. c. 61, s. 64, as to alterations in bills of exchange, par. 1216, below.) 3. By bankruptcy, when the bankrupt has obtained from the Court an order of discharge, with certain exceptions. (46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71; *Anson*, 326-8.) **633**

Discharge of
contract by
operation
of law.

PART II.
TIT. I.Quasi con-
tracts.

Quasi contracts are certain kinds of legal obligations in which the existence of an agreement is implied, or which have been clothed with the fictitious form of a contract. Under the old system of pleading certain liabilities were made to figure as though they sprang from contract. (Anson, 361-2.) **634**

Quasi contracts may arise from the judgment of a Court of competent jurisdiction, or from the acts of the parties. **635**

Judgment.

A judgment of a court of competent jurisdiction, ordering a sum of money to be paid by one of two parties to another, is not merely enforceable by the process of the Court, but can be sued upon as creating a debt between the parties, whether or no the Court be a Court of Record. (Anson, 363; *Williams v. Jones*, 13 M. & W. 628.) **636**

Act of
parties.

Act of parties giving rise to a quasi contract may be :
1. Admissions by one of a claim due to the other on an account stated. (See par. 1286, below.) 2. Payment by one of a sum which the other ought to have paid, e.g., if one of several co-debtors pays the entirety of the debt, he can recover from each of the others his proportionate share. But the money must have been paid upon request or under legal liability to pay. 3. When one receives money which should belong to the other, such as payments under contracts induced by fraud or duress, or money paid under a mistake of fact. In such cases the person receiving the money may be required to repay. (Anson, 363-4; *Marriott v. Hampton*, 2 Sm. L. C. 409.) **637**

TITLE II.

Of Particular Contracts.

CHAPTER I.

LANDLORDS AND TENANTS (*a*).

THE relation of landlord and tenant is created in various ways. It frequently arises by construction of law; as in the case of a tenancy from year to year, so long as both parties please, which is created by implication of law, where a tenement is held for an indefinite period at a rent payable yearly, half-yearly, or quarterly. But the most regular way of creating the relation of landlord and tenant is by a lease or agreement in writing for a certain term. **638**

PART II.
TIT. II.
CHAP. I.

How this
relation is
created.

By sect. 1 of the Statute of Frauds (29 Car. II. c. 3) all leases for a term exceeding three years must be in writing; and by sect. 3 of the Real Property Act, 1845 (8 & 9 Vict. c. 106), such leases must be by deed. Leases not exceeding three years from the making thereof, whereon the rent reserved to the landlord amounts to not less than two-thirds of the full improved value can be by word of mouth. (29 Car. II. c. 3, s. 2.)

Formalities
required.

(*a*) Many of the points pertaining to the relation between landlord and tenant belong to the subject of conveyancing law, as to which the reader is referred to Smith's Law of Property, 6th ed., by the author and J. Trustram.

As to lodging-house keepers and lodgers, see *infra*, Part II. Title II. Chap. X.

PART II.
TIT. II.
ЧАП. I.

An agreement for a lease for however short a term must be in writing, being a contract for an interest in land within sect. 4 of the Statute of Frauds; but an action for specific performance can be maintained upon a mere oral agreement for a lease if there has been sufficient part performance of the contract to take it out of the operation of the Statute of Frauds. (Woodfall, 92-3, 108, 137.) **639**

Nature of the
relation where
created by
lease or
agreement.

Where the relation is created by lease or agreement for the purpose, the landlord or owner of real property thereby parts with the possession of it to another person, who is called the tenant, and the tenant thereby agrees to render to the landlord a rent, that is, a certain thing, usually a sum of money periodically, as a compensation or recompense for the possession of the property to be held by the tenant. **640**

Remedy for
non-payment
of rent.

If the tenant makes default in payment of the rent, the landlord has a remedy for the recovery of it by action or by distress. **641**

Right of
distress.

Landlords who have the immediate reversion of premises in respect of which rent is due to them, may enter upon the premises, in person, or by deputy, and seize and sell the chattels therein, to raise money for the payment of the rent in arrear. (Ad. Con. 613-4, 686; Woodf. 439-532.) But, until a sale, the ownership of the chattels remains unchanged; and the landlord has no right to sell them to himself. (*King v. England*, 4 B. & S. 782.) **642**

When rent
is due.

When a
distress may
be made.

The rent does not become due till the last minute of the day on which it is payable; and a distress can only be made in the daytime, that is, between sunrise and sunset; and hence, practically, a distress cannot be made until the day after the rent is payable. (Woodf. 483-4; Ad. Con. 694.) **643**

A distress may be made even after the determination of the lease, if within six months, and during the continuance of the landlord's interest and the tenant's possession. (Ad. Con. 691; Woodf. 484; 8 Anne, c. 14, ss. 6, 7.) **644**

A gate or outer door or window may not be forced or broken open; nor may an unfastened window be opened, to make a distress; nor can a distress be made upon land not included in the demise, and in respect of which the rent is not payable, except upon land to which the goods have been fraudulently removed, and except in the case of cattle depasturing upon a common appendant or appurtenant. (Ad. Con. 694-5; Woodf. 487, 493-5; *Semayne's Case*, 1 Sm. L. C. 99; *Hancock v. Austin*, 14 C. B. (N. S.) 634; *Nash v. Lucas*, L. R. 2 Q. B. 590.) Entry over a wall and through an open window to make a distress is not illegal. (*Long v. Clarke*, (1894) 1 Q. B. 119.) **645**

In order to make a distress, seizure is necessary; but to constitute a seizure, in contemplation of law, it is sufficient to enter upon the demised premises and announce to the tenant or his servants, or the persons in actual occupation of the premises, an intention to distrain. (Ad. Con. 704; Woodf. 514; *Cramer v. Mott*, L. R. 5 Q. B. 357.) **646**

After seizure, the person distraining ought to make an inventory of the goods distrained and serve it, with a written notice of the amount of rent due and of the things distrained, on the tenant personally, or leave it on the premises; and this will amount to an impounding of the distress without the necessity of actually securing it. (Woodf. 517-8; *Tudor Real Prop. Ca.* 322; Ad. Con. 707.) **647**

After the expiration of five days from a distress being

Seizure of goods.
Inventory and notice.
Impounding.
Sale of distress.

made, and notice thereof and of the cause thereof being left on the premises, the distrainer may cause the chattels to be appraised by two sworn appraisers, and then sold, and the overplus, if any, may be left with the officer for the owner; unless the tenant replevy, or tender the rent and costs within the five days, even after the chattels have been impounded, or, in the case of growing crops, before the corn is ripe. (Ad. Con. 709-10; Woodf. 505-8; 2 Will. & M. c. 5, ss. 1, 2; *Johnson v. Upham*, 2 Ell. & Ell. 250. But as to agricultural holdings, see 46 & 47 Vict. c. 61, ss. 44-49.) Now by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 5, the necessity for appraisement is abolished, unless the tenant or owner require in writing an appraisement to be made. By the same Act the period for replevying is extended from five to fifteen days, if the tenant or owner request in writing this extension. **648**

The sale must be for the best price that can be obtained. If of hay or straw, it must not be made subject to a condition that the purchaser shall consume the hay or straw on the premises; though the lease contains a condition that the tenant shall so consume the same. (Ad. Con. 709; *Hawkins v. Walrond*, 1 C. P. D. 280.) **649**

What may be taken.

As a general rule, all the goods and chattels on the demised premises, whether they belong to the tenant himself or to strangers who have placed them in the custody or possession of the tenant, are distrainable. But certain things are absolutely privileged from distress; and other things are privileged if there be other sufficient distress on the premises. The following (inter alia) are absolutely privileged—(1) Tenant's fixtures, in certain cases; (2) animals, *feræ naturæ*; (3) things in

actual use of the owner, or money; (4) quickly perishable articles; (5) property of strangers placed on the demised premises for the purposes of the trade there carried on; such as cloth sent to a tailor, a horse to a farrier, or corn to a mill. This privilege is for the benefit of trade; (6) lodger's goods, if provisions of 34 & 35 Vict. c. 79, are complied with (see *infra*, pars. 651-3); (7) the things protected from a County Court execution being the wearing apparel and bedding of the tenant or his family, and the tools of his trade up to the value of 5*l*. (51 & 52 Vict. c. 21, s. 4). The following are privileged if there be other sufficient distress on the premises—1. Beasts of the plough and sheep; 2. Tools of trade not in actual use; 3. If the Agricultural Holdings Act (46 & 47 Vict. c. 61) applies, agisted stock, i. e., stock taken in by the tenant to be fed. (*Ad. Con.* 695; *Woodf.* 464-83; *Simpson v. Hartopp*, 1 S. L. C. 421; *Swire v. Leach*, 18 C. B. (N. S.) 479; *Miles v. Furber*, L. R. 8 Q. B. 77; *Lyons v. Elliott*, 1 Q. B. D. 210.) Goods delivered to an auctioneer for sale are privileged from distress, but the privilege does not extend to goods sold on the premises of the owner of the goods; nor to things of a third person placed on the demised premises to be sold with the goods of the owner of those premises. (*Lyons v. Elliott*, 1 Q. B. D. 210.)

650

By the stat. 34 & 35 Vict. c. 79 (passed 16th August, 1871), intituled, "An Act to protect the Goods of Lodgers against Distresses for Rent due to the Superior Landlord," after reciting that "lodgers are subjected to great loss and injustice by the exercise of the power possessed by the superior landlord to levy a distress on the furniture, goods, and chattels for arrears of rent due

Stat. 34 & 35
Vict. c. 79,
as to lodgers'
goods.

to such superior landlord by his immediate lessee or tenant," it is enacted as follows:—

“If any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord. And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanour.” (Sect. 1.) **651**

If the landlord or his agent shall, after the lodger has complied with these provisions, proceed with a distress, he shall be deemed guilty of an illegal distress; and the lodger may apply to a justice of the peace for restoration to him of the goods. (Sect. 2.) **652**

“Any payment made by any lodger pursuant to the first section of this Act shall be deemed a valid payment on account of any rent due from him to his immediate landlord.” (Sect. 3.) **653**

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TIT. II.
CHAP. I.

A person may be “a lodger” within the Act though the premises hired by him comprise almost all the house. (*Phillips v. Henson*, 3 C. P. D. 26.) **654**

Where the hiring comprises almost all the house.

If the landlord distrains in an unauthorized way, he becomes a trespasser from the beginning: all his acts are trespasses; he is a trespasser not only in entering, but in seizing and disposing of the things taken; and the ordinary rule of the common law is, that the tenant shall recover their full value, without deducting the rent in respect of which the distress was made. (*Attack v. Bramwell*, 3 B. & S. 520, 527.) **655**

Consequence of distraining in an unauthorized way.

Goods fraudulently or clandestinely removed after rent is due, in order to avoid distress, may, if a sufficient amount of other distrainable property is not left on the premises, be distrained within thirty days, if they have not been sold bonâ fide and for valuable consideration to a person ignorant of the wrongful act. And a penalty to the amount of double the value of the things removed may be recovered. (Ad. Con. 703; Woodf. 495-501; *Tomlinson v. Consolidated Credit Corporation*, 24 Q. B. D. 135; 11 Geo. II. c. 19, ss. 1, 2.) **656**

Goods fraudulently removed.

The landlord can distrain for six years' arrears of rent except in the case of a holding under the Agricultural Holding Act, 1883 (46 & 47 Vict. c. 61), in which case only one year's rent can be distrained for. If a tenant is bankrupt the landlord can distrain for six months' rent only (a). **657**

What arrears of rent landlord can distrain for.

(a) For the effect of bankruptcy on the position of landlord and tenant, see the Bankruptcy Acts, 1883 and 1890 (46 & 47 Vict. c. 52, and 53 & 54 Vict. c. 71).

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TIT. II.
CHAP. I.

Remedies for
wrongful
distress.

The remedies for a wrongful distress are recovery of the goods distrained by replevin and an action for damages. There is also a summary remedy before justices of the peace provided by the Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24, s. 4). **658**

Replevin.

By replevin, the owner of goods or cattle which have been wrongfully taken under a distress for rent obtains them back in a summary manner, though the registrar of the County Court of the district within which they were taken, upon giving security, to try the validity of the distress in an action of replevin to be forthwith commenced by him against the distrainer in the County Court or in the High Court and to return the goods or cattle if such return be awarded. (Woodf. 534-52; County Courts Act, 1888, ss. 133-6.) **659**

Replevin lies in case of a distress which is wholly illegal and not merely irregular and excessive. Thus it lies where the rent is not due, or goods exempt by law from distress are seized. A tenant may waive his right to replevy and bring an action for illegal distress instead. (Woodf. 534.) In cases where no rent was owing and the distraint has been sold, the owner may recover double the value of the goods distrained. (Woodf. 555.) **660**

Excessive
distress.

If a distress is manifestly beyond what is reasonably necessary for the purpose of realising the rent and expenses, the landlord is liable to an action for damages. (Ad. Con. 705; Woodf. 558; *Chandler v. Doulton*, 3 H. & C. 553.) **661**

Tender of
rent before
execution of
distress.

After a warrant of distress is delivered to the broker, but before it is executed, a tender of rent, even without expenses, is a good tender, so as to render the distress illegal. (*Bennett v. Bays*, 5 H. & N. 391.) **662**

If a landlord accept a bill of exchange for rent which is overdue, it is evidence of an agreement on his part

to suspend his right to distrain during the currency of the bill. (*Palmer v. Bradley*, (1895) 2 Q. B. 405.) **663**

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CHAP. I.

The landlord can sue on a covenant in the lease to pay the rent. An action on a covenant for rent may be brought within twenty years, and is not limited to six years. Where the rent is payable under an express contract but not under seal, the action to recover it must be brought within six years next after it has become due, or has been acknowledged in writing. So long as the relation of landlord and tenant subsists as a legal relation, the landlord's right to rent is not barred by non-payment of rent for any length of time, although there be a limit to the amount of arrears recoverable. An action may also be maintained for the recovery of rent when there is no express contract to pay it but one implied by the law. The words "yielding and paying," so much in a lease, imply a contract to pay the rent named. (Woodfall, 560-6.) **664**

Recovery of
rent by
action.

A power of re-entry is sometimes given for non-payment of rent, or non-performance of covenants, by a proviso in the lease. **665**

Power of
re-entry for
non-payment
of rent.

A proviso for re-entry authorizing a forcible entry in contravention of the statute against forcible entry is void. (Woodfall, 783; 5 Rich. 2, st. 1, c. 8; *Edwick v. Hawkes*, 18 Ch. D. 199.) **666**

Forcible
entry.

The tenant may obtain relief against forfeiture for non-payment of rent if he pay the rent and costs within six months after execution, unless it would be inequitable to grant relief. (Woodfall, 354-5; Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76); and Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126).) **667**

Relief against
forfeiture for
non-payment
of rent.

By the Common Law Procedure Act, 1852, s. 210, if there is half a year's rent in arrear, and no sufficient

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TIT. II.
CHAP. I.

distress is left on the premises, the landlord may serve a writ in ejectment without formal demand for the rent. **668**

Relief against
forfeiture for
breach of
covenants.

Relief against forfeiture for breach of covenants other than to pay rent, is given by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, which provides that a right of re-entry on forfeiture for breach shall not be enforceable until the landlord has served the tenant with notice specifying the breach complained of, and requiring compensation, and the lessee fails within a reasonable time to remedy the breach and make compensation. Moreover, if the landlord is enforcing a right of re-entry, the lessee may apply to the Court for relief, which may be granted at the discretion of the Court. This provision is not to extend to a covenant against assigning or underletting, or to a condition for forfeiture on bankruptcy of the lessee, or on the taking in execution of his interest, or in the case of a mining lease, to a covenant allowing the landlord to have access to the books or to inspect the mine. In such cases the Court can give no relief against forfeiture for breach of covenant, except that by the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 2, a limited relief is given against a forfeiture for bankruptcy where the lease is sold within a year of the bankruptcy. (Woodfall, 348-54; *Lock v. Pearce*, (1892) 2 Ch. 328; *Fletcher v. Nokes*, (1897) 1 Ch. 271.) **669**

Fixtures and
tenant's
erections.

In the widest sense, fixtures are things fixed to houses or lands; no erection or other object, however ponderous, is a fixture, if merely placed upon the freehold. (2 Ste. Com. 223; Chit. Con. 334.) **669a**

As a general rule, as between the heir and the personal representative of a deceased tenant of the fee, and as between the executors of the owner of a particular

estate and the person in remainder, and as between a landlord and tenant, the fixtures will belong, with the freehold to which they are annexed, to the heir in the first case, and to the person in remainder in the second case, and to the landlord in the third case, the maxim being “quicquid solo plantatur solo cedit”; but this does not apply to such of them as are put up merely for ornament, domestic use, or purposes of trade, and are capable of removal without material damage to the inheritance; which, in the first case, devolve to the personal representative, if not essential to the enjoyment of the inheritance, and, in the second and third cases, if put up by the owner of the particular estate or the tenant may be removed by him. (2 Ste. Com. 223-6; Woodf. 657-62.) **670**

It was held that the privilege in favour of trade of removing fixtures could not be extended to agriculture (*Elwes v. Mawe*, 2 Sm. L. C. 183); but by 14 & 15 Vict. c. 25, s. 3, where a tenant erects at his own expense, with the landlord's consent in writing, any buildings or machinery for agricultural or trade purposes, he may remove them, if he puts the land or building into as good a condition as it was in before the erection was made, unless the landlord, on receipt of a month's notice of the intention to remove the erection, elect to purchase the same at a value to be ascertained by two referees or an umpire. (2 Ste. Com. 225; Woodf. 667.) But as to agricultural holdings, see 46 & 47 Vict. c. 61, s. 34, whereby tenants of such holdings can remove, before or within a reasonable time after the termination of the tenancy, any engine, machinery, fencing, or other fixture, or any building affixed or erected by them with or without the consent of the landlord, for which he is not under that Act or other-

wise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord. One month's notice to the landlord must be given; and the landlord can elect to purchase any fixture or building. The tenant's rights to remove fixtures under this Act (though not his right to compensation for unexhausted improvements) may be excluded by express stipulation. (2 Ste. Com. 226-7. As to market gardens, see the Market Gardeners' Compensation Act, 1895, 58 & 59 Vict. c. 27.) **671**

The tenant's rights to remove fixtures may be controlled or modified by express stipulation or by local usage. (Woodf. 671.) **672**

At common law, if a tenant who is possessed of fixtures which he has a right to remove, does not remove them during the term, they become a gift in law to the landlord, unless the tenant, after the expiration of the term, is permitted by the landlord to remain in possession, and removes them during his lawful possession. (Woodf. 679; Ad. Con. 631.) But as to agricultural tenants, see par. 671, above. **673**

Rights to
crops, &c.

The right to away-going crops (i.e., crops not at maturity, sown during the last year of the tenancy), and allowances for tillage, manure, &c., and unexhausted improvements generally, as between the outgoing tenant and the incoming tenant or the landlord, depend on the custom of the particular locality, in the absence of express stipulation. (Ad. Con. 663-6; Woodf. 793-4.) The rights of tenants have been defined and extended by the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61.) **674**

Upon a sale or mortgage of land, fixtures will pass to the vendee or mortgagee if no intention is shown to

the contrary. Thus, in a recent case, an engine affixed to a concrete bed in freehold land was held to pass to a mortgagee of the land, although the engine did not belong to the owner of the land, but was let to him under a hire and purchase agreement, of which the mortgagee had no notice. (*Hobson v. Gorringe*, (1897) 1 Ch. 182.) **675**

If premises are destroyed by fire, without any gross negligence on the part of the tenant, and the tenant has not covenanted to repair, the landlord is without a remedy; though if fire is caused by gross negligence, the person guilty of such negligence will be liable.

Liability for fire.

(Woodf. 687.) Where a tenant has covenanted to repair (unless he excepted cases of fire), he or his assignee is bound to rebuild, if the premises are burnt down. And in each case he must pay the rent, though he may have lost the enjoyment of the premises; and it is doubtful how far he can compel his landlord to expend money received by him from an insurance office. (Woodf. 435, 627; Chit. Con. 347; but see 14 Geo. III. c. 78, s. 83.) **676**

Obligation to rebuild and pay rent in case of fire.

Unless there is an agreement to the contrary, the occupier is the party liable to pay poor rates, highway rates, county and borough rates. House tax, paving, watching, lighting, and cleansing rates also generally fall on the occupier. And he is also liable to the water rates, unless the annual value of the dwelling-house does not exceed 10*l.*; in which case it falls on the owner. The occupier has to pay the land and property taxes in the first instance; but he may deduct them out of his rent, as landlord's taxes, unless, in the case of land tax, the occupier has agreed to pay it. (Woodf. 586-618.) And in the absence of an agreement to the contrary, a sewers rate for extraordinary repairs or improvements falls upon the landlord, but a rate for

Liability to rates and taxes.

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ordinary annual repairs falls on the tenant. In the former case, the tenant pays in the first instance, and deducts the rate from his next rent. (Woodf. 602.)

677

Tithe rent-charge.

By the Tithe Act, 1891 (54 Vict. c. 8), tithe rent-charge is payable by the owner of the lands; and any contract made between an occupier and an owner of the land, after the passing of the Act, for the payment of tithe rent-charge by the occupier shall be void.

678

“Usual covenants.”

“Usual covenants” in a lease are to pay rent, to repair, to pay rates and taxes other than those usually paid by the landlord; but a covenant not to assign or underlet without the leave of the landlord is not a usual covenant. **679**

Duty of tenant as to use of the property.

A tenant of a house is bound to use it in a tenant-like manner, and a tenant of a farm to occupy it fairly and in a husband-like manner, and cultivate it according to the usage of the country where the land is situate. (Woodf. 632, 639; Ad. Con. 621.) **680**

Two kinds of repairs.

Repairs are of two kinds: substantial repairs and ordinary repairs. The former include repairs to the main walls, roofs, timbers, &c.; the latter, the common reparations to windows, shutters, doors, &c. (See Ad. Con. 622; Chit. Con. 346.) **681**

Liability to repair.

The landlord is never liable to repairs, unless he has contracted to do them. (Woodf. 630; Chit. Con. 348.) And even if he has contracted to do repairs, whether substantial or ordinary, he is not liable to an action for non-repair, unless he has received notice of the want of repair. (Woodf. 630; Chit. Con. 349; *Makin v. Watkinson*, L. R. 6 Ex. 25.) **682**

The extent of the liability of a lessee under a covenant or agreement to repair depends upon the age of

the buildings and their condition at the time of the demise, and on the length of the lease. It is the duty of a tenant who is under such a covenant or agreement, to keep the premises in as good a state as they were in at the period of the demise, by a timely expenditure of care and money. And if the buildings are then old and in bad repair, he must put them into good repair; but he is only bound to put them into good repair as old buildings, and not to renew them. (Ad. Con. 622; Woodf. 624; Chit. Con. 347.) As to the liability of a lessee where the premises are destroyed by fire, see par. 676, above. **683**

In the absence of an express agreement to repair, a lessee for years (unless prevented by fire or other inevitable accident) is bound to deliver up the premises at the end of the term in the same state as they were in at the time of the demise, subject only to the deterioration occasioned by ordinary wear and tear and the reasonable use of them for the purpose for which they were let, without such wilful and unreasonable neglect as would cause serious damage which might be avoided by a little timely care and trifling expense, as in cleansing drains or sewers, or replacing a tile, &c. (Ad. Con. 622.) **684**

There is an implied condition that a furnished house or lodging shall be in good and tenantable condition, and reasonably fit for occupation from the very day on which the tenancy is to begin; and that where the same is in such a condition that there is either great discomfort or danger to health in dwelling in it, the intending tenant is entitled to repudiate the contract altogether. But there is no implied condition that a furnished house or lodging will continue fit for habitation during the whole of the tenancy. (*Wilson v.* Furnished houses or lodgings.

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Finch Hutton, 2 Ex. D. 336; *Sarson v. Roberts*, (1895) 2 Q. B. 395.) **685**

The Housing
of the Work-
ing Classes
Act, 1890.

There is no such implied condition in the case of ordinary leases of lands, houses, or warehouses (*Manchester Warehouse Co. v. Carr*, 5 C. P. D. 507; *Lane v. Cox*, (1897) 1 Q. B. 415); but by 53 & 54 Vict. c. 70, there shall be implied in contracts (at certain low rents only) for letting for habitation by persons of the working classes a house or part of a house a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation. **686**

Bugs.

If furnished houses or apartments are infested with bugs, the tenant or lodger may leave without paying rent; but this does not apply to leases of unfurnished houses. (Ad. Con. 609, 677.) **687**

Fences.

It is the duty of the occupier of lands to repair the fences. (Woodf. 651; Dixon, 77.) **688**

Trees, bushes,
and hedges.

The property in timber, and in trees which are timber according to the custom of the country, is in the owner of the inheritance. The property in bushes, even where they have been cut down by a stranger, is in the tenant. And he may clip the hedges, but he may not grub them up or destroy them. Such trees as are not timber at all, nor fruit trees, he may cut down; unless they afford a shelter to the house, or he is restrained by agreement. (Woodf. 654-6; Dixon, 53; 2 Rose. 933.) **689**

Notice to
quit.

In the absence of agreement or enactment to the contrary, a yearly tenancy may be determined by half a year's notice; and such notice must expire at the close of the current year of the term, so that the tenant may leave on the anniversary of his entry. Where the tenancy is for a shorter period, a shorter notice is sufficient, but it must expire at the close of that period. In the case of a monthly letting, a month's notice is

required. Notice to determine a weekly tenancy is requisite. (*Bowen v. Anderson*, (1894) 1 Q. B. 164.)

In the case of lodgings, a long notice is not necessary; a reasonable notice is sufficient. (Ad. Con. 646-7, 650; 2 Rose. 1007; *Morgan v. Davies*, 3 C. P. D. 260.) **690**

In the case of a tenancy under the Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), a year's notice expiring with the current year of the tenancy shall be necessary, unless the parties agree in writing to the contrary. **691**

The notice must mention a specific time for quitting. It may be oral, unless otherwise agreed. If a written notice is given, it may be given to a member of the family or a servant, at the dwelling-house; or it may be sent by post. (*Tanham v. Nicholson*, L. R. 5 H. L. 561; 2 Rose. 1013-5; Chit. Con. 351; Ad. Con. 647, 654-5.) **692**

A notice to quit may be waived, either expressly, or by certain acts of the landlord inconsistent with the cessation of the tenancy, e. g., receiving rent. (2 Rose. 1016; Ad. Con. 655; Chit. Con. 353.) **693**

Where a lease is to expire on a particular event or at a particular time, no notice to quit is necessary. (Ad. Con. 646.) **694**

If the tenant holds over after the expiration of the term, and there has been a payment and acceptance of subsequent rent, the law, in the absence of evidence to the contrary, implies that he continues to hold on such of the terms of the previous demise as are applicable to a tenant from year to year. (Ad. Con. 656; 2 Rose. 1004.) **695**

A tenant wilfully retaining possession after the termination of his term, and after possession has been demanded and notice in writing has been given him by

Holding over.

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the lessor, and in the absence of a bonâ fide belief that he has a right to do so, is liable to pay, for the time he holds over, double the yearly value of the premises. (Ad. Con. 657; 1 Rose. 710; *Swinfen v. Bacon*, 6 H. & N. 184, 846.) **696**

And if a tenant gives notice to the lessor of his intention to quit at a particular time, and does not deliver up possession at that time, he may be compelled to pay double the rent which would otherwise have been payable. (Ad. Con. 658; 1 Rose. 712.) **697**

Action for
recovery of
land or
ejectment by
landlord.

Where the landlord claims the land from his tenant, it is not necessary for the landlord to prove his title to it; for it is a rule that a tenant or any one claiming under him shall not be allowed to dispute his landlord's title, that is, the original right of the person who admitted him into possession: but he may show that it has since expired, or been determined or parted with. (Broom, Com. 869; 2 Rose. 999-1000; Chit. Con. 342-3.) **698**

Action for
recovery of
land or
ejectment by
a stranger.

A tenant to whom a writ in ejectment is delivered, or to whose knowledge it comes, must, under penalty of forfeiting the value of three years' improved or rack rent, forthwith give notice thereof to his landlord, that he may be allowed to appear and defend. (Cole, Eject. 115; Woodf. 848.) **699**

Action for
use and
occupation.

Where hereditaments have been held or occupied by a person by permission of the landlord or owner, and yet not by virtue of any demise under seal, the landlord or owner may have an action against him for the use and occupation of the hereditaments, though there may have been no beneficial enjoyment. And any demise or agreement otherwise than by deed may be used as evidence of the quantum of damages to be recovered. (1 Rose. 323; Ad. Con. 615, 669.) **700**

Every occupier of land has now a right, incident to and inseparable from his occupation, to kill and take, by himself or by certain other persons authorized by him in writing, ground game (hares and rabbits), concurrently with any other person having a similar right, on the ground in his occupation; and for this no *game* licence is requisite. All agreements in contravention of such right are void. (43 & 44 Vict. c. 47.) But the tenant can agree with a third party to let the shooting to him, when the tenant has the right of shooting. (*Morgan v. Jackson*, (1895) 1 Q. B. 885.) **701**

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Right of
tenant to kill
and take
ground game.

CHAPTER II.

SALE OF GOODS.

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Sale of Goods
Act, 1893.
Effect on
previous
legislation.

THE law relating to sale of goods has been codified by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). **702**

The Sale of Goods Act, 1893, repeals 1 Jac. I. c. 21 (an Act against brokers); sects. 15 and 16 (commonly cited as sects. 16 and 17) of the Statute of Frauds (29 Car. II. c. 3); sect. 7 of the Statute of Frauds (Amendment) Act, 9 Geo. IV. c. 14 (Lord Tenterden's Act); sects. 1-5 of the Mercantile Law Amendment (Scotland) Act, 1856 (19 & 20 Vict. c. 60); sects. 1 and 2 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97); overrides sect. 100 of the Larceny Act, 1861, so far as it relates to offences other than offences amounting to larceny; and reproduces sects. 8 and 9 of the Factors Act, 1889 (as to sellers and buyers of goods in possession), which are, however, left unrepealed. (56 & 57 Vict. c. 71, ss. 24 (2), 25 (1), 60.) **703**

The following matters are expressly excluded from the operation of the Act:—(1) The rules of bankruptcy relating to contracts of sale; (2) the rules of the common law, including the law merchant, except where they are inconsistent with the provisions of the Act; more particularly the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause; (3) the enactments relating to bills of sale, and certain enactments affecting the sale of goods (e.g., Sale of

Foods and Drugs Acts); (4) any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security. (Broom, Com. 402; 56 & 57 Vict. c. 71, s. 61.) **704**

A contract of sale is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price. There may be a contract of sale between one part owner and another. A contract of sale may be absolute or conditional. Where, under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, or executed contract of sale. Where the transfer of the property in the goods is subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell, or an executory contract of sale. An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled, subject to which the property in the goods is to be transferred. (Chalm. Sale, 1-2; 56 & 57 Vict. c. 71, ss. 1-4.) **705**

Contract of sale.

“Property” means the general property in goods, and not merely a special property. (56 & 57 Vict. c. 71, s. 62, sub-s. 1.) “Goods” include all chattels personal other than things in action and money. The term also includes emblements (industrial growing crops), and things attached to or forming part of the land, which are agreed to be severed before sale, or under the contract of sale. (Sect. 62, sub-s. 1.) **706**

The essence of sale is the transfer of the property in a thing from one person to another for a price. Therefore, if a man purchase his own goods there is no sale. But one co-owner may sell to another, and when a man's goods are sold under an execution or distress, he may himself become the purchaser. (Chalm. Sale, 2.)

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Since the Married Women's Property Act, 1882, a wife can sell to and buy from her husband. (*Ramsay v. Margrett*, (1894) 2 Q. B. 18.) **707**

A contract for work and materials is not a contract of sale. (Chalm. Sale, 4; Anson, 73; and see *Lee v. Griffin*, 1 B. & S. 272, where it was held that a contract for the supply of artificial teeth was a contract of sale, because the parties contemplated the ultimate delivery of a chattel.) **708**

The transfer of goods for goods is not a contract of sale, but a contract of exchange or barter. (Chalm. Sale, 4.) **709**

Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property. Where necessities are sold and delivered to an infant, or to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor. (56 & 57 Vict. c. 71, s. 2.) **710**

Formalities of
 the contract.

Subject to sect. 4 of the Sale of Goods Act, 1893, and various other statutory provisions, and to the law relating to corporations, a contract of sale may be by deed, writing, or word of mouth, or may be implied from the conduct of the parties. (56 & 57 Vict. c. 71, s. 3.) **711**

Sect. 4,
 Sale of Goods
 Act, 1893.

A contract for the sale of any goods of the value of 10*l.* or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged, or his agent in that behalf. (56 & 57 Vict. c. 71, s. 4.) **712**

This section reproduces the provisions of sect. 17 of the Statute of Frauds in somewhat different language. Sect. 17 of the Statute of Frauds enacted that "no contract for the sale of any goods, wares, or merchandise for the price of 10*l.* or upwards shall be allowed to be good except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." **713**

It will be seen that the chief alterations made by sect. 4 of the Sale of Goods Act, 1893, are the substitution of the word "value" for "price," to give effect to cases which held such was the operation of the construction of Lord Tenterden's Act with the 17th section (Chalm. Sale, 15; and see below, par. 716), and of the words "enforceable by action" for the words "allowed to be good," to give effect to cases which held that the words "no contract shall be allowed to be good" in sect. 17 were the equivalent of "no action shall be brought" in sect. 4 of the Statute of Frauds, and that they did not make the contract void, but only unenforceable. (Chalm. Sale, 15; Broom, Com. 406-7; *Maddison v. Alderson*, 8 App. Cas. 467, 488; *Lucas v. Dixon*, 22 Q. B. D. 360.) **714**

The provisions of sect. 4 apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or

rendering the same fit for delivery. (56 & 57 Vict. c. 7, s. 4, sub-s. 2.) **715**

This sub-section reproduces the repealed sect. 7 of Lord Tenterden's Act (9 Geo. IV. c. 14), the object of which was to make it clear that the Statute of Frauds applied to executory as well as executed contracts of sale. (Chalm. Sale, 15.) **716**

There is an acceptance of goods within the meaning of sect. 4 when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not. (Sect. 4, sub-s. 3.) **717**

This sub-section reproduces the language of Bowen, L.J., in *Page v. Morgan* (15 Q. B. D. 228). In that case the defendant by oral contract bought wheat over the value of 10*l.* by sample. The wheat arrived in sacks on the premises of the defendant, and was there examined by him with the sample and rejected. The jury found that the wheat was equal to sample, and on appeal it was held that the defendant could not plead the Statute of Frauds (sect. 17) as a defence to an action for the price of the wheat, as there had been sufficient acceptance within the section. **718**

In a recent case (decided since the Sale of Goods Act, 1893, was passed) the facts were as follows: Hay, over the value of 10*l.*, was sold by oral contract to the defendant. The defendant came on board the barge, in which the hay was sent, as it lay alongside his wharf, and, taking a sample of the hay, declared, "This is not to my sample, and I shall not have it." It was held there was evidence of an act done by him in relation to the goods recognizing a pre-existing contract, and therefore there was sufficient acceptance

within the meaning of sect. 4 of the Sale of Goods Act, 1893. (*Abbott v. Wolsey*, (1895) 2 Q. B. 97.) In this case, it will be observed, the goods had not even been brought upon the defendant's premises. **719**

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The note or memorandum must designate the parties by name or description, the goods sold, the price if agreed on, and must show directly or by implication the nature of the promise of the party to be charged. Oral evidence is not admissible to connect documents together to make up a memorandum. (Chalm. Sale, 150.) **720**

Note or
memorandum.

Contracts for the sale of goods, when not to be performed within the space of one year from the making thereof, are within the operation of sect. 4 of the Statute of Frauds. (See par. 465, above.) **721**

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in the Act called "future goods." (56 & 57 Vict. c. 71, s. 5.) **722**

Subject-
matter of the
contract.

There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. (Sect. 5, sub-s. 2.) **723**

Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods. (Sect. 5, sub-s. 3.) In this case the equitable interest only passes to the buyer, and his rights are liable to be defeated if, before he gets the legal property in the goods, the seller disposes of them to a second purchaser without notice, who thus first obtains the legal estate. (Chalm. Sale, 18.) **724**

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Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. (Sect. 6.) Specific goods are defined by the Act as "goods identified or agreed upon at the time a contract of sale is made." (Sect. 62.) **725**

Thus, where a specific cargo of corn was sold, which the parties supposed to be on its voyage from Salonica to England, but which had in fact, before the date of sale, become so heated that it had been unloaded at Tunis and sold for what it would fetch, it was held that the contract was void. (Anson, 135; Chalm. Sale, 18-9; *Couturier v. Hastie*, 5 H. L. C. 673.) **726**

But this principle would not apply to a sale of generic goods, for "genus nunquam perit." (Chalm. Sale, 19.) **727**

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided. (Sect. 7.) **728**

The price.

The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (Sect. 8, sub-s. 1.) **729**

When the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. (Sect. 8, sub-s. 2.) **730**

Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; pro-

vided that if the goods, or any part thereof, have been delivered to or appropriated by the buyer, he must pay a reasonable price therefor. (Sect. 9, sub-s. 1.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault. (Sect. 9, sub-s. 2.) **731**

Representations made during a contract of sale may be either anterior to the contract, or terms within the contract. A representation anterior to the contract which is a mere expression of opinion, or mere commendation by the seller of his wares, has no effect, even if it turns out to be false; but a representation anterior to the contract which materially induces the other party to contract is, if false, a ground for rescission of the contract (*Bannerman v. White*, 10 C. B. N. S. 844), or a ground for resisting specific performance, and sometimes, if a representation is wilfully made with knowledge of its untruth, and in certain other exceptional cases, it is a ground for damages. (Anson, 150-1, 163.) **732**

Conditions
and war-
ranties.

Representations that are terms within the contract may be either conditions or warranties. The remedy for the breach of any term of a contract of sale, or of any other contract, differs according as the intention of the parties was that the term should be regarded as of vital or only subsidiary importance. A warranty is a term subsidiary to the main purpose, and a breach of it gives the aggrieved party a right to sue for damages only in respect of such breach. A condition is a vital or essential term of the contract, and a breach of it gives the aggrieved party a right to repudiate the contract, or to sue for damages for breach of the contract as distinct from damages for the breach of such term. (Broom, Com. 421.) **733**

“Warranty, as regards England and Ireland, means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.” (56 & 57 Vict. c. 71, s. 62.) **734**

As to conditions and warranties on a contract of sale the Sale of Goods Act, 1893, provides as follows:—

Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not to be deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract. (Sect. 10, sub-s. 1.) **735**

In a contract of sale “month” means *primâ facie* calendar month. (Sect. 10, sub-s. 2.) **736**

In England and Ireland—(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated; (b) whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract; (c) where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to

be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect. (Sect. 11, sub-s. 1.) Nothing in this section shall effect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise. (Sub-s. 3.) **737**

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

Implied
undertakings
by seller as
to title, &c.

- (1.) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
- (2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods.
- (3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made. (Sect. 12.) **738**

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description. (Sect. 13.) **739**

Subject to the provisions of the Sale of Goods Act,

1893, and of any statute in that behalf (*a*), there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- (1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose (*Gillespie v. Cheney*, (1896) 2 Q. B. 59):
- (2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of a merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:
- (3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:
- (4.) An express warranty or condition does not nega-

(*a*) E. g., The Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 17.

tive a warranty or condition implied by the Sale of Goods Act, 1893, unless inconsistent therewith. (Sect. 14.) **740**

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As to sale by sample, the Act provides:—

(1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample—

(a) There is an implied condition that the bulk shall correspond with the sample in quality:

(b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample:

(c) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample. (Sect. 15; *Heilbutt v. Hickson*, L. R. 7 C. P., at p. 456.) **741**

As to the question when the property in the goods passes in a contract of sale the Sale of Goods Act, 1893, provides as follows:—

Transfer of
property.

(1) Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. (Sect. 16.)

(2) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the

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Rules for
ascertaining
intention.

contract, the conduct of the parties, and the circumstances of the case. (Sect. 17.) **742**

- (3) Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer:—

- (a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.
- (b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the

expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

What is a reasonable time is a question of fact.

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Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract. (Sect. 18.) **743**

As to rule 2, an article may be in course of manufacture. In this case, unless a different intention be shown, the property does not pass to the buyer until the article is delivered in a finished state, or until it is ready for delivery, and is approved by the buyer in that state. It has been held that there is no exception to this rule in the case of a ship to be paid for by stated instalments as the work progresses. (*Seath v. Moore*, 11 App. Cas. 370, 380; *Chalm. Sale*, 44.) **744**

In connection with rule 4, the recent case of *Kirkham v. Attenborough*, (1897) 1 Q. B. 201, should be noted. It was there held that when goods, delivered on sale or return, are pledged by the buyer, the pledging of the goods is "an act adopting the transaction," so as to pass the property in the goods to him, and consequently

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the pledgee obtains a good title to the goods as against the seller. **745**

As to rule 5, who makes the appropriation when there is an election to be made? It is said that the party who is by the agreement to do the first act, which from its nature cannot be done till the election is determined, has authority to make the choice, in order that he may perform his part of the agreement. When once he has performed the act the choice has been made, and the election is irrevocably determined; till then he may change his mind as to what the choice shall be. (Blackburn, 128.) When appropriation has been made so that the property passes, it will be found that there has been an actual or constructive delivery of the goods. (Chalm. Sale, 45.) **746**

Reservation
of jus
disponendi.

Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. (Sect. 19, sub-s. 1.)

Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal. (Sub-s. 2.)

Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill

of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him. (Sub-s. 3.) **747**

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Risk.

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk, whether delivery has been made or not. If delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault; and either seller or buyer may be bailee for the other, and so must use ordinary diligence. (Sect. 20; Chalm. Sale, 49.) **748**

The general rule of law is, that no one can give a better title than he himself possesses—*nemo dat quod non habet*. If A. sells B. goods, the purchaser acquires no better title than A. had, unless A. sells under B.'s authority, or B. by his conduct is estopped from denying A.'s authority. (Sect. 21, sub-s. 1.) **749**

Transfer of
title.

But there are certain exceptions to the general rule:—

- (1) Certain statutes enable the apparent owner of goods to dispose of them as if he were the true owner thereof, e.g., the Factors Act, 1889 (52 & 53 Vict. c. 45). (Sect. 21, sub-s. 2.)

750

- (2) The sale is under any special common law, or statutory power of sale, or under the order of a Court of competent jurisdiction (sect. 21, sub-s. 2), e.g., where a pawnbroker sells an unredeemed pledge, or a landlord sells goods which he has duly distrained for rent. (Chalm. Sale, 52.) **751**

(3) The goods are sold in market overt to a buyer, who takes in good faith and without any notice of any defect or want of title on the part of the seller. But this does not affect the law relating to the sale of horses. (Sect. 22.) **752**

(4) When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of sale, the buyer acquires a good title to the goods if he buys in good faith and without notice of the seller's defect of title. (Sect. 23.) When goods have been obtained by fraud, the person so obtaining them has either no title at all or a voidable one. If the person defrauded really intended to part with the property in the goods, though induced to do so by fraud, there is a voidable contract. But if a person obtains goods from another by falsely pretending to be someone else, there is no contract between the parties; the person who so obtains the goods has no title at all, and can give none. (*Cundy v. Lindsay*, 3 App. Cas. 459; see above, par. 527; Chalm. Sale, 54-5.) **753**

(5) Where a seller, having sold goods, continues or is in possession of the goods, or of the documents of title to the goods, a delivery or transfer by the seller or his mercantile agent of such goods or documents under any sale or pledge, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make

the same. (Sect. 25, sub-s. 1.) In a case where wine stored in a warehouse was sold, and the seller afterwards pledged the wine to the warehouseman, who had no notice of the sale, it was held that the warehouseman acquired no title under this section, for, as between the particular parties, the seller was not in possession when he effected the pledge. (*Nicholson v. Harper*, (1895) 2 Ch. 415.) **754**

- (6) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or his mercantile agent, of the goods or documents of title, under any sale or pledge, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner. (Sect. 25, sub-s. 2.) **755**

- (7) A writ of execution against goods, though delivered to the sheriff, does not prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had notice that such writ had been delivered to and remained unexecuted in the hands of the sheriff. (Sect. 26.) **756**

As to exception (3), the advantage of a sale in market overt existed at common law. All shops in the City of London are market overt. But a sale of jewellery to a tradesman in his show-room is not within the custom. Market overt.

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(*Hargreave v. Spink*, (1891) 1 Q. B. 25.) Outside the City of London markets with the custom of market overt may exist either by grant or prescription, but the custom does not apply to a market established by a local Act. A sale of a horse in market overt will not give a better title than the seller had, unless certain formalities are complied with; and even then, if the horse has been stolen, the rightful owner may recover it at any time within six months, on paying or offering to the person possessed of it the price he has paid for it. (2 & 3 Phil. & Mary, c. 7; 31 Eliz. c. 12; Chalm. Sale, 53-5.) **757**

Upon conviction of the thief, the property in stolen goods reverts in the original owner, and the effect of sect. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), was to extend this rule to all offences under that Act (*Bentley v. Vilmont*, 12 App. Cas. 47); but the Sale of Goods Act, 1893, now expressly provides that where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise; and that, notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender. (Sect. 24, sub-ss. 1 and 2.)

758

The effect of this section is to restore the old state of the law and to override sect. 100 of the Larceny Act, 1861 (and sect. 27 (3) of the Summary Jurisdiction

Act, 1879), so far as it relates to offences other than offences amounting to larceny, e.g., obtaining goods on false pretences. (Chalm. Sale, 56.) **759**

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Exceptions (5) and (6) (56 & 57 Vict. c. 71, s. 25, sub-ss. 1 and 2), are also contained in the Factors Act, 1889 (52 & 53 Vict. c. 45), ss. 8 and 9, which are left unrepealed by the Sale of Goods Act, 1893. The question has arisen whether the hirer under a hire-purchase agreement is a person who has "agreed to buy goods" within the meaning of sect. 9 of the Factors Act, 1889, and sect. 25, sub-s. 2, of the Sale of Goods Act, 1893, so as to be able to give a good title to a person who takes bonâ fide from him before he has paid all the instalments due on the agreement. It has been decided that it depends upon the terms of the agreement. If the agreement is an out and out sale, but payment is to be made by instalments, he can give a good title. (*Lee v. Butler*, (1893) 2 Q. B. 318; *McEntire v. Crossley*, (1895) A. C. 457.) But if the hirer is not under a binding agreement to buy the goods and can at any time determine the contract by returning them, it has been decided that he cannot give a good title. (*Helby v. Matthews*, (1895) A. C. 471.) **760**

Hire and
purchase.
agreements.

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the contract. (Sect. 27.) The buyer may buy an expectancy, or chance of obtaining the goods ("emptio spei"). (Sect. 5, sub-s. 2.) Unless otherwise agreed, delivery of goods and payment of the price are concurrent conditions. (Sect. 28.) **761**

Performance
of the
contract.

Apart from any contract, express or implied, between the parties, the place of delivery is the seller's place of business, if he have one, and if not, his residence; provided that, if the contract be for the sale of specific

goods, which to the knowledge of the parties when the contract is made are in some other place, then that is the place of delivery. (Sect. 29, sub-s. 1.) **762**

Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. (Sect. 29, sub-s. 2.) **763**

Where the goods at the time of sale are in the possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; but this is not to affect the operation of the issue or transfer of any document of title to the goods, e.g., a bill of lading. (Sect. 29, sub-s. 3.) **764**

Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. (Sect. 29, sub-s. 4.) **765**

Unless otherwise agreed, the expenses of putting the goods into a deliverable state must be borne by the seller. (Sect. 29, sub-s. 5.) **766**

Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject the goods, or accept, and pay for them at the contract rate. Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or reject the whole, or accept the whole and pay for them at the contract rate. Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole. (Sect. 30, sub-ss. 1, 2, 3.) **767**

This section is subject to any usage of trade, special agreement, or course of dealing between the parties. (Sect. 30, sub-s. 4.) **768**

Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. (Sect. 31, sub-s. 1.) **769**

Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract, and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated. (Sect. 31, sub-s. 2.) **770**

Delivery of the goods to a carrier, in pursuance of the contract, is *primâ facie* delivery to the buyer. (Sect. 32.) **771**

Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. (Sect. 34.) **772**

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted

Acceptance
in perform-
ance of the
contract.

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them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. (Sect. 35.) There may be an acceptance within the meaning of sect. 4 of the Sale of Goods Act, 1893, which is not an acceptance in performance of the contract. **773**

When the buyer, having the right to do so, refuses to accept the goods, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them. (Sect. 36.) **774**

Where the buyer wrongfully neglects or refuses delivery of the goods, he is liable to the seller for any loss occasioned thereby, and also for a reasonable charge for the care and custody of the goods. This is apart from the rights of the seller, where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract. (Sect. 37.) **775**

Rights of an
unpaid seller
against the
goods.

The seller of goods is deemed to be an unpaid seller (a) when the whole of the price has not been paid or tendered; (b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition has not been fulfilled by reason of the dishonour of the instrument or otherwise. The term "seller" here includes any person who is in the position of a seller, e.g., an agent who is responsible for the price. (Sect. 38.) Subject to the provisions of sect. 47 of the Sale of Goods Act, 1893, and sect. 10 of the Factors Act, 1889, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—(a) A lien on the goods (i.e., a right to retain them)

for the price while he is in possession of them; (b) in case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them; (c) a right of resale, as limited by this Act. (Sect. 39, sub-s. 1.) When the property in goods has not passed to the buyer, the unpaid seller has analogous rights to lien and stoppage in transitu in addition to his other remedies. (Sub-s. 2.) **776**

The unpaid seller of goods, who is in possession of **Lien.** them, is entitled to retain possession of them until payment or tender of the price—(a) where the goods have been sold without any stipulation as to credit; (b) where the goods have been sold on credit, but the term of credit has expired; (c) where the buyer becomes insolvent. The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. (Sect. 41.) **777**

Though the unpaid seller has delivered part of the goods, he may exercise his right of lien on the remainder, unless the delivery was such as to show a waiver of the lien. (Sect. 42.) **778**

The unpaid seller loses his lien thereon—(a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods; (b) when the buyer or his agent lawfully obtains possession of the goods; (c) by waiver thereof. (Sect. 43, sub-s. 1.) **779**

When the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price. (Sect. 44.) A person is deemed to be insolvent, within the meaning of

Right of
stoppage in
transitu.

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the Sale of Goods Act, who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not. (Sect. 62, sub-s. 3.) **780**

The goods can only be stopped in transitu. This means, while they are in the possession of a middleman. A carrier, or other bailee, may hold the goods—(a) as agent for the seller; in that case the seller preserves his lien; (b) as carrier or bailee merely, and not exclusively as the agent of either the seller or buyer; in that case the right of stoppage in transitu exists; (c) solely as agent, originally or by subsequent attornment, for the buyer; in that case there either has been no right of stoppage, or it is determined. (Chalm. Sale, 83-4.) **781**

Goods are in transit—(a) though they have passed through many agents' hands, if they have not reached their destination; (b) though they are not in motion, e.g., they may be in the hands of a forwarding agent. (Chalm. Sale, 82-3.) If the goods have so far got to their journey's end that they must wait for fresh orders from the buyer to put them again in motion, the transit is at an end. (*Bethell v. Clark*, 20 Q. B. D. 615.) **782**

The Sale of Goods Act, 1893, provides that—(1) Goods shall be deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee. (2) If the buyer or his agent in that behalf obtain delivery of the goods before their arrival at the appointed destination the transit is at an end. (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and

continues in possession of them as bailee for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. (4) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back. (5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer. (6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end. (7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods. (Sect. 45.) **783**

The right of stoppage in transitu is effected either by taking possession of the goods, or by giving notice to the carrier or other bailee. Such notice may be given to the person in actual possession of the goods, or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal may communicate it to his agent in time to prevent delivery to the buyer. The carrier or other bailee, on receiving notice of stoppage in transitu, must redeliver the goods to the seller. (Sect. 46.)

784

The indorsement of a bill of lading to a bonâ fide purchaser by the buyer was held to defeat the seller's right of stoppage in transitu. (*Lickbarrow v. Mason*, 1

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Sm. L. C. 674.) And now by the Factors Act, 1889, s. 10, reproduced in sect. 47 of the Sale of Goods Act, 1893, all documents of title are on the same footing as a bill of lading. A transfer in proper form by the buyer in possession of a document of title to goods to a person who takes the document in good faith, and for valuable consideration, if by way of sale defeats the unpaid seller's right of lien or stoppage in transitu, and if by way of pledge, then the seller's right of lien or stoppage in transitu can only be exercised subject to the rights of the transferee. (Sect. 47.) **785**

Right of
resale.

The exercise by the unpaid seller of his right of lien or stoppage in transitu does not generally rescind a contract of sale; but where the seller resells the goods the buyer acquires a good title thereto as against the original buyer, but the seller can be sued for damages by the original buyer. If, however, the goods are of a perishable nature, or the seller has given notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay, the seller may resell the goods and recover from the original buyer damages for breach of contract. The seller may also expressly reserve the right of resale by the contract in case the buyer should make default, and, on the buyer making default, resell the goods and sue for damages as well. (Sect. 48.) **786**

Actions for
breach of the
contract.

Where, under a contract of sale, the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay, the seller can sue him for the price of the goods. (Sect. 49, sub-s. 1.) **787**

Remedies of
the seller.

Where, under the contract, the price is payable on a certain day, irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may sue for the price, although the property in the goods has not passed. (Sect. 49, sub-s. 2.) **788**

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept. (Sect. 50.) **789**

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Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery. The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract. Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver. (Sect. 51.) **790**

Remedies of
the buyer.

In any action for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its judgment direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. (Sect. 52.) **791**

If a warranty is broken the buyer can—(a) set up against the seller the breach of warranty in diminution

or extinction of the price; or (b) maintain an action against the seller for damages. (Sect. 53, sub-s. 1.) For breach of a condition, or for fraud, the buyer may reject the goods. (Sect. 11; Chalm. Sale, 103.) **792**

Sometimes the buyer or the seller can recover interest or special damages, or recover money paid where the consideration for the payment of it has failed. (Sect. 54.)

793

Sale by
auction.

In the case of a sale by auction each lot is *primâ facie* deemed to be the subject of a separate contract of sale. The sale is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it is not lawful for the seller to bid himself or to employ any person to bid at the sale. A sale by auction may, however, be notified to be subject to a reserved price, and a right to bid may also be expressly reserved by the seller. (Sect. 58.) **794**

CHAPTER III.

MORTGAGORS AND MORTGAGEES, PLEDGORS AND
PLEDGEES, AND PERSONS HAVING A LIEN.I. *Mortgagors and Mortgagees.*

A LEGAL mortgage is a security, created by means of a transfer, by a debtor to his creditor, of the legal ownership of real or personal estate, subject to be defeated on the discharge of the debt. (Sm. Law of Prop. 6th ed. pars. 986-95a.) **795**

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Legal mortgage defined.

A legal mortgage of land, which must be by deed, ordinarily transfers the property in the land to the lender or mortgagee, the borrower or mortgagor covenanting to pay the money lent at a stated day, usually six months from the date of the mortgage, with interest in the meantime until the repayment of the principal. (Chit. Con. 543.) In Equity the time named for payment is not considered as of the essence of the contract, and the estate may be redeemed and a reconveyance compelled afterwards. **796**

Mortgage on land.

A person may create an equitable, though not a legal, mortgage by a mere memorandum or a mere deposit of deeds. (Chit. Con. 543.) **797**

A mortgage of goods is effected by an instrument called a bill of sale. A bill of sale, given as a security for money (*a*), must be in accordance with the form in

Bills of sale.

(*a*) Bills of sale given otherwise than as a security for money are regulated by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

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the schedule to the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), must set forth the consideration for which it is given, must be attested by a credible witness, and must be registered in the Central Office of the Supreme Court within seven days after execution. Registration must be renewed once every five years. The amount secured by a bill of sale must not be less than 30*l*. (*Fenton v. Blyth*, 25 Q. B. D. 417; *Heseltine v. Simmons*, (1892) 2 Q. B. 547; *Darlow v. Bland*, (1897) 1 Q. B. 125; Chit. Con. 544-5.) **798**

Future or after-acquired chattels cannot be included in a bill of sale (*Thomas v. Kelly*, 13 App. Cas. 506); but future book debts can. (*Tailby v. Official Receiver*, 13 App. Cas. 523.) **799**

The Bills of Sale Act, 1882, provides that the goods mortgaged can only be seized under the bill of sale for— (1) non-payment of the money secured, (2) bankruptcy of the grantor, or his suffering the goods to be distrained, (3) fraudulent removal of the goods, (4) non-production of receipts for rents, rates, and taxes, (5) levying of execution against the goods of the grantor. The goods must not be at once removed, but the grantor is allowed a period of five days from seizure within which he may apply to the High Court or a judge, who, if satisfied that the cause of seizure no longer exists, may restrain the grantor from removing or selling the goods. (45 & 46 Vict. c. 43, ss. 7, 13; Chit. Con. 544.) **800**

The Bills of Sale Act, 1882, does not apply to debentures issued by mortgage, loan, or other incorporated companies, and secured upon their capital, stock, or goods, chattels and effects. (45 & 46 Vict. c. 43, s. 17.) But industrial society debentures are not within this exception. (*Great Northern Railway v. Coal Co-operative Society*, (1896) 1 Ch. 187.) **801**

II. *Pledgors and Pledgees, generally.*PART II.
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A pledge or pawn is a thing delivered to a person to be kept by him as a security for, and restored on the payment of, a debt or the performance of an engagement. (Ad. Con. 733.) **802**

Definition of a pledge or pawn.

A pledge of personal chattels differs from a mortgage ; for a pledge only passes a special or qualified property or ownership to the pawnee, with a power of sale in case of non-payment at the stipulated time ; and the pledgor retains the general property or ownership, and may transfer it both at Law and in Equity ; whereas a mortgage passes the general property or ownership to the mortgagee, though conditionally. (Sm. Law of Prop. 6th ed. par. 1128 ; Ad. Con. 733, 745.) **803**

Difference between a pledge and a mortgage.

A pledge differs from a lien ; for a lien arises by act of law, and not by act of party, and gives no right of property to the person entitled to it, but is merely a personal right to retain goods. **804**

Difference between a pledge and a lien.

Transfer of the possession of the chattel to the pledgee is essential. (Chit. Con. 393 ; Ad. Con. 733 ; *Martin v. Reed*, 11 C. B. (N. S.) 730 ; *Hilton v. Tucker*, 39 Ch. D. 669.) **805**

Transfer of possession.

If the pledge would be the worse for use, it may not be used by the pledgee. (Ad. Con. 755 ; Chit. Con. 395.) **806**

Use of pledge.

Where a thing is pledged for a certain time, the pledgee cannot demand payment or fulfilment, nor the pledgor the return of the pledge, until the expiration of that time. Where a thing is pledged indefinitely to a person who is not a pawnbroker, the pledgor is entitled to redeem at any time, and the pledgee may compel the pledgor to redeem or be foreclosed, i. e., lose his right of redemption. (Ad. Con. 750.) **807**

Rights of pledgor and pledgee generally.

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In case of default in payment, the pledgee (not being a pawnbroker), after giving due notice and opportunity to redeem, may sell the pledge, and apply the proceeds in liquidation of the debt: or he may sue the pledgor for the debt, though he retain the pledge; for the pledge is only a collateral security. But he is not entitled to a judgment for foreclosure. (Chit. Con. 395; Ad. Con. 752.) **808**

Stolen
property
pledged.

If stolen property has been pledged with any person, the owner may sue him, even though he had no knowledge of the theft. But a pledge by a mercantile agent, or by a seller or buyer or their mercantile agents, in possession of goods, or of documents of title thereto, gives a good title to the pledgee to enable him to retain the goods as a security for money advanced as against the true owner. (Ad. Con. 748-50; Factors Act, 1889, ss. 2, 8, 9; Sale of Goods Act, 1893, s. 47; see above, par. 785.) **809**

Pawnbrokers.

The rights and liabilities of pawnbrokers are now regulated by the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). The Act does not apply to loans of above 10*l.*, or to loans made before the Act came into operation, which are regulated by the old law. **810**

Who are to
be deemed
pawnbrokers.

Every person who keeps a house, shop, or other place for the purchase and sale of goods or chattels, or for taking in goods or chattels by way of security for money advanced thereon, and who purchases or takes in any goods or chattels, and pays or advances or lends thereon any sum of money not exceeding 10*l.*, under any agreement, express or implied, for the subsequent repurchase or redemption of such goods, is to be deemed to be a pawnbroker within the meaning of the Act. (Sect. 6). Every pawnbroker's name must be placed on the door of his business. (Sect. 13; Ad. Con. 755-6.) **811**

III. *Persons having a Lien.*

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Liens are either legal or equitable. **812**

A legal lien is the right of a person to retain property of which he has the lawful possession, until a debt due to him has been satisfied. (Cross on Lien, 2, 30-8.)

Legal lien.

813

An equitable lien is a hold upon property for the satisfaction of a claim attaching thereto, under an express charge or contract or a constructive trust.

Equitable lien.

(Sm. Law of Prop. 6th ed. pars. 976-82.) **814**

There are two species of legal liens, namely, particular liens and general liens. **815**

Two kinds of legal liens.

Particular liens are liens upon goods, in respect of money due on them, or of labour, trouble or care expended upon them; and these liens are favoured in law. So that unpaid sellers of chattels not parted with, and not sold on credit, parties who have advanced money on the security of chattels, common carriers, shipowners, tailors, factors, artisans, and others to whom chattels have been delivered, in order that such persons might bestow labour, trouble, or care upon them, for a pecuniary consideration, have a lien upon them for it.

Particular.

816

General liens are liens in respect of a general balance, due in the ordinary course of dealing in the same business; and these are founded on express agreement or custom only, or the previous course of dealing, which must be proved by the bailee; and they are taken strictly. Warehousemen, wharfingers, innkeepers, factors, packers, insurance brokers, bankers, and solicitors have a general lien. (Cross on Lien, 14-5, 20, 23-4; 2 Rose. 976-8; *Allen v. Smith*, 12 C. B. (N. S.) 638; *In re Witt, Ex parte Shubrook*, 2 Ch. D. 489; *Mulliner v. Florence*, 3 Q. B. D. 484.) **817**

General.

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Rules as to
 the existence,
 transfer, and
 cesser of liens.

A lien must not be at variance with the terms or implied understanding upon which the property was received. (2 Rose. 980.) **818**

It cannot be transferred. (Ad. Con. 836.) **819**

If goods are sold on credit, and no time for delivery is fixed, the seller has no lien. (Chit. Con. 378; Sale of Goods Act, 1893, s. 41.) **820**

If security, such as a bill, note, or bond, payable at a distant day, is taken for a debt for which the creditor has a lien, or a new agreement is come to for payment of such a debt in a particular manner, the lien is gone. (Chit. Con. 509; Byles, 377.) **821**

If a bailee voluntarily parts with the possession of property upon which he has a legal lien, the lien ceases. (2 Rose. 981; Cross on Lien, 38.) **822**

A lien may be at once extinguished by a tender of the money. (2 Rose. 981.) **823**

When a person has merely a lien on goods, he has no right to sell them (2 Rose. 978; Cross on Lien, 47; *Mulliner v. Florence*, 3 Q. B. D. 484), except in the case of an innkeeper acting under 41 & 42 Vict. c. 38. **824**

Innkeeper.

The lien of an innkeeper extends even to those goods brought by his guest, which the guest has fraudulently obtained from their owner. (2 Rose. 977; *Mulliner v. Florence*, 3 Q. B. D. 484.) **825**

CHAPTER IV.

PARTNERS.

PARTNERSHIP is the voluntary unincorporated association of two or more persons, who contribute money, effects, labour, care, or skill, for the purpose of carrying on, as principals, a common undertaking, for a lawful object, for their common profit. (Lindley, 11-13; Tudor Ca. on M. L. 519; Ad. Con. 1164; Pol. Dig. of Part. 1-10; *Pooley v. Driver*, 5 Ch. D. 458.) **826**

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Partnership.
defined.

The law of partnership has been declared and amended by the Partnership Act, 1890 (53 & 54 Vict. c. 39), which defines partnership as "the relation which subsists between persons carrying on business with a view of profit." But a company registered under the Companies Act, 1862, or formed or incorporated by or in pursuance of any other Act or letters patent, or royal charter, is not a partnership within the Act. (Sect. 1, sub-s. 2.) **827**

Partnership
Act, 1890.

The partnership contract need not be in writing, but may be entered into verbally, or inferred from the conduct of the parties. (Tudor Ca. on M. L. 518, 558; Ad. Con. 1164; 1 Rosc. 534-5; Lindley, 88.) **828**

Contract of
partnership.

An agreement in writing for a partnership is designated by the name of articles of partnership. (2 Ste. Com. 104; Lindley, 407.) **829**

Articles of
partnership.

Each of the partners must be competent to contract; and therefore, if the contract of partnership is attempted to be entered into by an infant, such infant is not

Who may be
partners.

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responsible for the debts of the firm, and when he comes of age or before he may, if he choose, disaffirm past transactions. (Tudor Ca. on M. L. 522; Lindley, 79-82.) **830**

Criterion and
requisites of a
partnership.

A community of profits is essential to a partnership. But there may be a participation in the profits without a partnership. And an equality of profit is not necessary to a partnership; nor is it necessary that there should be a community of that which produces the profit, or a community of loss. For one partner may contribute all the money, all the stock, or all the labour; and, by express stipulation, one partner may be exonerated from all loss, as between himself and his companions, though he will nevertheless be liable to strangers. (Tudor Ca. on M. L. 519-21, 523; Lindley, 41-54: 1 Rosc. 534-5; Ad. Con. 1164-5, 1169; *Ex parte Tennant*, 6 Ch. D. (Ap.) 303; *Badeley v. Consolidated Bank*, 38 Ch. D. 238.) **831**

Different
positions of
persons
interested in
the profits.

A person may be a partner with one only of a firm, in respect of his share, without being a partner with the others. And persons may be partners as to third persons, without being partners inter se. And even before 28 & 29 Vict. c. 86 (Bovill's Act), now repealed and re-enacted in the Partnership Act, 1890, s. 2, if a person had a share in the profits, not as a principal, so as to give him a right to an account, but as a mere agent, factor, or servant, he was not a partner as between himself and his employers, but he was a partner as to third persons. But a person might have a virtual interest in the profits, by stipulating that he should receive, as agent, factor, servant, or creditor, or in some other character than that of a principal, a sum proportioned to the gross profits, without being a partner, even as to third persons. So that a person having a virtual

interest in the profits, may, in respect of that interest, be a partner, both as regards the other person or persons engaged in the undertaking, or one of them, and as regards strangers; or he may be a partner as regards strangers only; or he may not be a partner in any respect. (Lindley, 54-8; Tudor Ca. on M. L. 521, 531; *Cox v. Hickman*, 8 H. L. C. 268.) **832**

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The Partnership Act, 1890, now enacts that in determining whether a partnership does or does not exist regard shall be had to the following rules:—

Partnership
Act, 1890.

- (1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the owners do or do not share any profits made by the use thereof.
- (2) The sharing of gross returns does not of itself create a partnership, whether the persons so sharing have or have not a joint or common interest in the property from which the returns are derived.
- (3) The receipt by a person of a share of profits is *primâ facie* evidence that he is a partner, but such receipt does not of itself make him a partner; and in particular it does not in the following cases:—
 - (a) Where a debt or other liquidated amount is received by instalments or otherwise out of the accruing profits of a business.
 - (b) Where a servant or agent is remunerated by a share of the profits of the business.
 - (c) Where a widow or child of a deceased partner receives by way of annuity a portion

of the profits made in the business in which the deceased person was a partner.

(d) Where money is lent, under a contract in writing signed by or on behalf of all the parties thereto, to a person engaged or about to engage in any business, to receive a rate of interest varying with the profits, or a share of the profits arising from carrying on the business.

(e) Where a person receives, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill. (Sect. 2; see *In re Young*, (1896) 2 Q. B. 484.) **833**

Postponement
of rights of
person lend-
ing or selling
in considera-
tion of share
of profits in
certain cases.

In the event of any person to whom money has been advanced by way of loan upon such a contract, whether oral or in writing, as is mentioned above, or of any buyer of a goodwill in consideration of a share of the profits, being adjudged a bankrupt, or entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying insolvent, the lender of the loan or the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors for valuable consideration in money or money's worth have been satisfied. (Sect. 3; and see *In re Fort, Ex parte Scholfield*, (1897) 2 Q. B. 495.) **834**

Meaning of
firm.

Persons who have entered into partnership with another are called collectively a firm. (Sect. 4.) **835**

Dormant
partner.

A dormant partner (that is, one who participates in the profits, but does not appear to the world as a partner) is ordinarily responsible for the engagements of the firm. (Lindley, 47; Tudor Ca. on M. L. 519; 1 Rose. 534; Ad. Con. 341.) **836**

Nominal
artner.

Even without entering into any contract, a man may incur the liabilities of a partner, as between himself and

third persons dealing with the firm, by lending his name and credit to a firm, or in any manner holding himself out as a partner therein, even without disclosing his name, if such holding out has come to the knowledge of such third persons. Such a person is called a nominal partner, and he is liable on the principle of estoppel. A partner who has retired from the firm may be liable, on the ground of "holding out," for debts of the firm contracted afterwards, if he has omitted to give notice of the agreement to the creditors. But a dormant partner who was not known to the creditors to be a partner would not be so liable after his retirement; and the estate of a deceased partner is not liable on the doctrine of holding out by the continued use of the old firm name. The principle of holding out is not applicable to liability in tort. (Partnership Act, 1890, s. 14; Tudor Ca. on M. L. 530, 540-2; Lindley, 65-75; 1 Rose. 534-5; Ad. Con. 342; Pol. Dig. of Part. 51-5; *Smith v. Bailey*, (1891) 2 Q. B. 403.) **837**

The executors of a deceased partner do not become partners in his stead, unless the partnership contract contains a stipulation that they shall be admitted in his place and they choose to take advantage of it, or they have entered into some agreement to that effect, express or implied. The executors then become personally liable. (Tudor Ca. on M. L. 520; Ad. Con. 342.)

Rights of
executors of
a deceased
partner.

838

Each partner is deemed the agent of the rest, whether they be actual or nominal, acting or dormant, and has authority, as such, to bind them to any person dealing *bonâ fide* (and without express notice from them that they will not be responsible), by such contracts respecting the goods or business of the firm as are within the ordinary scope of the partnership dealing, and even by

Relations of
partners to
persons deal-
ing with
them.

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negotiable instruments circulated in the name of the firm, where the purposes of the firm require that its members should pass such instruments, notwithstanding any agreement among the partners, unknown to such person, that no partner shall have such authority. Each partner may bind the rest by a loan or a purchase apparently connected with the business, or by a sale or pledge of the joint property, or by a receipt, or by a bill, note, guarantee, or other security, in the name of the firm and on its behalf, where such dealings are required for the purposes of the firm, though he instantly apply the money or goods to his own use; provided the person with whom he dealt had no reason to suppose that a fraud was intended. And where an act of one partner is binding on all, each is liable upon it in his individual capacity, as regards his separate estate, as well as in respect of the partnership property. (Partnership Act, 1890, s. 5; Pol. Dig. of Part. 26-34; Tudor Ca. on M. L. 464-86, 542; Lindley, 133-6; 1 Rose. 533; Ad. Con. 338-9; Byles, 50-4; *Marsh v. Joseph*, (1897) 1 Ch. 213.) **839**

One member of a firm of solicitors has no implied authority to bind the rest, by drawing or indorsing bills in the name of the firm, nor by drawing a post-dated cheque in the name of the firm; for, as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days' date as intervene between the day of delivering the cheque and the date marked on the cheque. (*Forster v. Mackreth*, L. R. 2 Ex. 163; *Garland v. Jacomb*, L. R. 8 Ex. (Ex. Ch.) 216.) A cheque given in the ordinary manner in the name of the firm, and not post-dated, will in all cases bind the firm. **840**

Partners in a trade strictly mercantile may bind each

other by drawing, accepting, or indorsing bills or notes in the name of the firm. (Lindley, 141-3; Tudor Ca. on M. L. 474-7; Broom, Com. 473; Byles, 50-1.) **841**

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One partner has no authority, by implication of law from the mere existence of a partnership, to bind the firm by opening a banking account on its behalf in his own name. (*Alliance Bank v. Kearsley*, L. R. 6 C. P. 433.) **842**

A partner has no authority to accept shares in a company in satisfaction of a debt due to the firm, even though such shares are fully paid up. (*Niemann v. Niemann*, 43 Ch. D. 198.) **843**

Each partner may pay or satisfy a debt so as to exonerate the firm, and may give time to a partnership debtor, and execute a valid release in the name of the firm, and thereby preclude them from suing. And payment, release, or discharge to one partner, is payment, release, or discharge to all, even after a dissolution, and notwithstanding a clause in the deed of dissolution that another partner shall receive all the debts. But partners are not bound by any contract made with their co-partner, as an individual, and on his own account. (Tudor Ca. on M. L. 550; Lindley, 146-9, 244-6; 1 Rose. 664.) **844**

A partner cannot bind the firm by deed, unless authorized by deed to do so. (Broom, Com. 635; Tudor Ca. on M. L. 490; Lindley, 149; Ad. Con. 346-7; Pol. Dig. of Part. 33.) **845**

There is no general or implied authority for one partner to bind the firm by guarantee. (Pol. Dig. of Part. 34.) **846**

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless

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CHAP. IV.

he is in fact specially authorized by the other partners ; but this does not affect any personal liability incurred by an individual partner. (Partnership Act, 1890, s. 7.)

847

Liability of
partners.

A partner is liable jointly with his co-partners for all debts and obligations of the firm incurred while he is a partner in the usual course of the partnership business, and after his death his estate is severally liable for such debts and obligations so far as they remain unsatisfied, subject to the prior payment of his separate debts. (Partnership Act, 1890, s. 9 ; Pol. Dig. of Part. 40-2.)

848

Partnership debts are, therefore, joint only, except as to the estate of a deceased partner. Thus, in *Kendall v. Hamilton* (4 App. Cas. 504), A. and B., ostensibly trading in partnership, borrowed money of C., for which C. sued them and obtained judgment, but the judgment was not satisfied. Afterwards C. discovered that D., a solvent person, had been an undisclosed partner with A. and B. at the time of the loan. A judgment recovered against some of divers joint contractors is, even without satisfaction, a bar to an action against another of them alone, and it was held that D.'s liability, being joint only, C.'s action was barred. (Pol. Dig. of Part. 41.) But if there are distinct causes of action the rule in *Kendall v. Hamilton* does not apply. (*Wegg-Prosser v. Evans*, (1895) 1 Q. B. 108.) **849**

When partners have joined in a breach of trust their liability is joint and several. **850**

Liability of
firm for torts
of a partner.

When by any wrongful act or omission of any partner, acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to

the same extent as the partner so acting or omitting to act. (Partnership Act, 1890, s. 10.) Every partner is liable jointly with his co-partners and also severally for torts for which the firm becomes liable. The question in all the cases is, "What is the ordinary course of the business?" (*Ex parte Eyre*, 1 Ph. 227; *Blair v. Bromley*, 2 Ph. 354; *Cleather v. Twisden*, 28 Ch. Div. 340; *Rhodes v. Moules*, (1895) 1 Ch. 236; *Marsh v. Joseph*, (1897) 1 Ch. 213.) **851**

If one partner makes an admission, acknowledgment, or representation, respecting the partnership concerns in the ordinary course of business, his co-partners are generally bound by it. And if notice is given by or to one acting partner, respecting the partnership business, it is tantamount to notice by or to all, except in the case of a fraud on the firm committed by or with the consent of that partner. (Tudor Ca. on M. L. 488; *Lindley*, 136-40; Ad. Con. 338-9; 1 Rose. 71.) **852**

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Admissions
by, and notice
to, partner.

As to persons who have not dealt with a firm before its dissolution, the liability of a partner ceases upon his dissolving the partnership, removing his name from the firm, and giving general notice of the dissolution in the "Gazette." But particular notice must be given to persons who have previously dealt with the firm. (*Lindley*, 220-30; Tudor Ca. on M. L. 544; 1 Rose. 537; Ad. Con. 345; Partnership Act, 1890, ss. 17, 36.)

Cessation of
liability for
debts and
obligations.

853

The retiring partner will still, however, remain liable in respect of engagements prior to the dissolution, other than such as have been entered into with creditors who have expressly or impliedly agreed to the substitution of the credit of the new firm for that of the old. (Tudor Ca. on M. L. 544, 546; Ad. Con. 343; Pol. Dig. of Part. 60; Partnership Act, 1890, s. 17.) **854**

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Novation is the technical name for a contract of substituted liability. The estate of a deceased partner may be discharged in the same manner. (*Re Head*, (1894) 2 Ch. 236.) **855**

The estate of a person who dies, or becomes bankrupt, is not liable for partnership debts contracted after the date of the death or bankruptcy. (Partnership Act, 1890, s. 36, sub-s. 3.) **856**

The liability of a dormant partner ceases on his retirement, except as to persons who knew him to be a partner, and to whom he has not given notice of his retirement. (Lindley, 223-4; Tudor Ca. on M. L. 546; Ad. Con. 345-6; 1 Rose. 537; Broom, Com. 639.) **857**

A person who is admitted as a partner does not thereby become liable to creditors of the firm for anything done before he became a partner, unless the new firm has assumed the liability and the creditors have agreed to accept it and discharge the old partnership. (Partnership Act, 1890, s. 17.) **858**

On the death of a partner, the personal representatives of the deceased do not become personally liable for his debts if they do not carry on the business of the partnership; but the estate of the deceased is liable until his debts have been discharged. But if the executors of a deceased partner carry on the business for the benefit of the estate, they become personally liable as partners. (Lindley, 610-11, 622-7; 1 Rose. 535.) **859**

Rights of
creditors.

The creditors of the partnership have a right to the payment of their debts out of the partnership funds, before the private creditors of any of the partners. On the other hand, the separate creditors of each partner are entitled to be first paid out of the separate effects of

their debtor, before the partnership creditors can claim anything. (Lindley, 718-24; Tudor Ca. on M. L. 509, 601.) **860**

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Subject to any agreement, express or implied, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses. A partner may not substitute another to take his place, but he may assign his share of the profits. Such an assignment, however, would be a ground for applying to the Court to grant a dissolution. A partner must not make private gain out of the partnership, or compete with the firm. (Partnership Act, 1890, ss. 24, 29, 30-1.) **861**

Relations of
partners
inter se.

A partnership is dissolved—1. By effluxion of time, if entered into for a fixed term. 2. By notice, if the partnership is for an undefined time, i. e., a partnership at will. 3. By death or bankruptcy of any partner (unless there is an agreement to the contrary between the partners). 4. At option of the other partners by one of the partners suffering his share of the partnership property to be charged for his separate debt. 5. By the happening of any event which makes the partnership illegal. 6. By judgment of the Chancery Division of the High Court of Justice, which may be obtained on various grounds, such as lunacy of a partner, or permanent incapability of a partner to perform his duties, where the conduct of a partner is calculated to prejudicially affect the carrying on of the business, where a partner wilfully commits a breach of the partnership agreement, or so conducts himself that it is not reasonably practicable to carry on the business in partnership with him, where the business can only be carried on at a loss, and whenever in the opinion of the Court it is just and equitable that the

Dissolution
of partner-
ship.

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partnership be dissolved. (Partnership Act, 1890, ss. 32-5.) **862**

Suit in
Chancery.

Before the Judicature Acts, one partner, as a general rule, could not sue another in a partnership matter; but an action would lie, by one partner against another, for an ascertained balance due on an account taken, and in some other cases of partnership. A partnership account was usually taken in Chancery. And if the parties could not agree as to the division of profits, those who insisted upon the immediate division of the profits had to resort to the Court of Chancery for a dissolution of the partnership, a settlement of the accounts, and a division of the balance: for, in many cases at least, the profits cannot be ascertained while the business is being carried on; and it could not be conveniently wound up except in Chancery. By the Judicature Acts, actions for the dissolution of partnerships, and the taking of partnership and other accounts, are assigned to the Chancery Division. (Tudor Ca. on M. L. 559-70; Ad. Con. 1175.) **863**

Partners'
equitable lien.

Partners have an equitable lien on the firm's property, which does not imply a right to possess, and so differs from the ordinary lien of common law. It exists during the partnership, but comes into full play only in the event of a dissolution, and consists of the right to have the firm's specific property sold (including the goodwill), and the proceeds, after discharging liabilities, divided among the partners. (Sect. 39; Pol. Dig. of Part. 163-7.) **864**

Sale of
goodwill.

When the goodwill of a business is sold, the vendor, in the absence of any special agreement, may carry on a similar business in competition with the purchaser, but not under the name of the former firm. The vendor may not solicit the customers of the former

firm. (*Labouchere v. Dawson*, 13 Eq. 322; *Trego v. Hunt*, (1896) A. C. 7.) The purchaser alone may represent himself as continuing or succeeding to the business of the vendor. (Pol. Dig. of Part. 107-13.)

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865

Goodwill is the benefit arising from connection and reputation, the probability of the old customers going to the new firm which has acquired the business. **866**

CHAPTER V.

CORPORATIONS.

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Classification
of corpora-
tions.

CORPORATIONS are either sole, i. e., of which there is only one member at a time, or aggregate, i. e., of which there are several members. The principal instances of corporations sole are ecclesiastical persons. (Pol. Con. 107-10.) **867**

Corporations may also be classified as ecclesiastical, civil, and law; municipal and trading. (Chit. Con. 297.) **868**

Formation of
corporations.

Corporations may be created by a special Act, or by Royal Charter; or formed under a general Act, such as the Companies Act, 1862. (25 & 26 Vict. c. 89.) **869**

Capacities of
corporations.

The capacities of corporations are limited by (1) natural possibility, i. e., by the fact that they are artificial and not natural persons; (2) legal capacity, i. e., by restrictions imposed by the power creating a corporation. **870**

Limits im-
posed by
natural
incapacity.

A corporation can do no act except through an agent. It cannot commit a crime in the strict sense, though any or all of the members might be individually liable. It cannot enter into any strictly personal contract or relation. But it is liable for the acts or defaults of its agents done in the course of its employment. It may sue for a libel; and it may be made liable in an action of deceit for the fraud of its agent. (*Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; and see above, par. 33.) It may be indicted for a common nuisance. But it cannot be bound by acts of even all its members

when of a non-corporate character. The governing body, the majority, or even the whole of the members of a corporation, constituted by a formal act and having defined purposes, cannot appropriate any part of the corporate funds to their private use in a manner not warranted by the constitution; for all the members of the corporation are not equivalent to the corporation. (Pol. Con. 110-4). **871**

There have been two opposite views on the question of the limits imposed by positive law. The doctrine of special capacities, by which it is held that a corporation can only do those things which it is empowered to do; and the doctrine of general capacities, by which it is held that a corporation can do all those things which it is not forbidden to do. (Pol. Con. 115-6.) Modern authority favours the doctrine of general capacities, but it is subject to this qualification, established by *Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653, that where there is an Act of Parliament creating a corporation for a particular purpose (e. g., a company formed under the Companies Act, 1862), and giving it power for that particular purpose, what it does not expressly or impliedly authorize is to be taken as prohibited. **872**

Limits imposed by positive law.

Companies registered under the Companies Act, 1862, are formed by a memorandum of association, showing the objects of the company; and articles of association, prescribing regulations for the company. Any seven or more persons associated for any lawful purpose may form a company. The memorandum of association cannot be altered except in certain particulars specified by statute; the articles of association may be varied by special resolution. (Lindley C. 117-9; see also Companies Memorandum of Association Act, 1890, 53 & 54 Vict. c. 62.) **873**

Companies under Act of 1862.

A company, registered under the Companies Act, 1862, is forbidden to enter, even with the unanimous assent of the shareholders for the time being, into a contract foreign to its objects as defined in the memorandum of association. (*Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653; Pol. Con. 123.) **874**

In public companies the limits of the directors', or other officers of the company, authority, imposed on them by the constitution of the company, are presumed to be known by third parties dealing with them. The corporation is not, therefore, bound by anything done by them in its name when the transaction is on the face of it in excess of the powers thus defined. But mere irregularities in the conduct of the internal affairs of the body corporate will not invalidate acts which, as regards third parties, on the face of them are regular and authorized. (Pol. Con. 115-20.) **875**

Where a contract entered into on behalf of a registered company is ultra vires, because entirely beyond the scope of the memorandum of association, it cannot be ratified (*Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653); but if the contract be merely ultra vires on the part of the officers of the company by whom it is executed, it may be ratified by the company, so as to become binding on them. (*Reuter v. Electric Telegraph Co.*, 6 E. & B. 341, 348.) So, when the directors merely exceed their authority the shareholders may ratify their act, or they may by acquiescence in the act of the directors be estopped from objecting to its validity. **876**

Contracts entered into before the company is formed, as a rule, bind only the promoters (*Kelner v. Barber*, L. R. 2 C. P. 174), and not the company, even if mentioned in the articles of association. But, if such

contract is *intra vires*, the company after incorporation may enter into a new contract upon the terms of the old one; and, although the company cannot ratify a contract made before it came into existence, yet a company has been held in equity to be bound by agreement or representation of the promoters, on grounds independent of contract and analogous to estoppel. (*Chit. Con.* 289-90; *Pol. Con.* 190; *Re Metropolitan Coal Consumers' Association, Karberg's Case*, (1892) 3 Ch. 1.) **877**

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A corporation cannot be bound by negotiable instruments except—(1) When the negotiation of bills and notes is itself one of the purposes for which the corporation exists, as in the case of the Bank of England; (2) when the instrument is accepted or made by an agent for the corporation whom its constitution empowers to accept bills, &c., on its behalf, either by express words or by necessary implication. (*Crouch v. Credit Foncier*, L. R. 8 Q. B. 374; *Pol. Con.* 124-7.) **878**

Negotiable
instruments.

At common law corporations could bind themselves only under their common seal. Exceptions to this rule have, however, arisen in the course of time—1. Small matters of daily occurrence, or of urgency, do not require a seal. (*Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.) 2. All contracts which are necessary and incidental to the purposes for which the corporation exists can be entered into without the seal. (*Nicholson v. Bradfield*, L. R. 1 Q. B. 620; *Clarke v. Cuckfield Union*, 21 L. J. Q. B. 349.) In the case of a trading corporation all contracts made in the ordinary course of its business, or for purposes connected therewith, fall within this description. (*South of Ireland Colliery Co. v. Waddle*, L. R. 3 C. P. 463.) With regard to municipal corporations, however, the old rule is still in force to a great extent. (*Mayor of Oxford v. Crow*, (1893) 3

When a
corporation
can contract
without seal.

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Ch. 535—grant of a lease of corporate property not under seal could not be enforced by the corporation; but see *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402.)

3. When the corporation has performed its own part of the contract, so that the other party has had the benefit of it, the corporation may sue on the contract, even though it is not under seal. 4. The presumption of a demise from year to year from payment and acceptance of rent is the same against a corporation as against an individual landlord. 5. A corporation can be sued upon a quasi-contract, e.g., for money received by mistake. 6. Agreements not under seal may be made by certain corporations in accordance with statutory powers. The Companies Act, 1867 (30 & 31 Vict. c. 131), s. 37, as regards companies dealt with by the Act, enacts that any contract, which, if made between private persons, would by law be required to be in writing and under seal, may be made, varied, or discharged under the common seal; if the contract as between private persons should be in writing and signed by the parties to be charged therewith, it may be made, raised, or discharged in writing, and signed by any person under the express or implied authority of the company; if, as between private persons, the contract might be made by parol only, not reduced into writing, it may be made, varied, or discharged by parol by any person acting under the express or implied authority of the company. (Pol. Con. 142-54.) **879**

The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 3, provides that nothing in that section as to the formation of the contract of sale shall affect the law relating to corporations. **880**

Difference
between a
company and
a partnership.

The substantial difference between partnerships and companies is that an ordinary partnership is founded

on personal confidence between the parties, and gives every partner equal rights in the conduct of the business. A commercial company is composed of a minority of active members designated as directors, and of a majority who need not know anything of one another, and who have no part in the ordinary conduct of the business. (Pol. Dig. of Part. 7-8; Lindley, P. 21.) Moreover, the liability of a partner for debts of the firm is unlimited; but the liability of the members of a company may be limited to the amount of their shares or guarantees. (Companies Act, 1862 (25 & 26 Vict. c. 89).) By the Companies Act, 1862, sect. 4, a private partnership cannot be formed of more than ten persons for banking, or twenty for any other business.

881

Partnerships are created by word of mouth, or by articles of partnership, which are freely alterable. Companies under the Companies Act of 1862 by memorandum of association and articles of association. (See par. 873; above.) A corporation proper is created by special authority, and the rights and obligations of the body corporate are not exerciseable by, or enforceable against, the individual members thereof. (Lindley, C. 8.) **882**

Corporations
proper.

Clubs are usually managed by a committee chosen out of the entire body of the members. The general liability of any individual member of the club for goods ordered, or on contracts entered into, by the committee, depends upon the question whether the committee was acting within the scope of its authority as agent for the club. The authority of the committee generally rests upon certain rules and regulations drawn up for and by the club. Thus, some or all of the members of the club may be rendered jointly liable

Clubs.

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by showing that they have authorized the contract declared upon, either through the medium of the committee, or of some accredited officer of the club, or by their own direct act, e.g., by having attended and voted on the committee, or at a general meeting of the club. (Broom, Com. 632-3.) **883**

CHAPTER VI.

BAILORS AND BAILEES GENERALLY.

BAILMENT is a delivery of goods in trust, upon a contract expressed or implied. **884**

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CHAP. VI.

There are six sorts of bailments: 1. A bailment of goods to keep gratuitously for the use of the bailor; which is called depositum. 2. A loan of chattels gratis, to be used by the bailee; which is called commodatum. 3. A delivery of chattels to be used by the bailee for hire; which is called locatio et conductio. 4. A delivery of chattels as a pawn or pledge, to be a security to the bailee for money borrowed from him by the bailor; which is called vadium, or pignori acceptum. 5. A delivery of chattels in order that they may be kept or carried, or that something may be done about them, for a reward, to be paid by the bailor to the bailee; which is called locatio operis faciendi. 6. A delivery of chattels to somebody who is to carry them, or do something about them, gratis; which is called mandatum. (1 Sm. L. C. 167-230.) **885**

Definition of
bailment.
Different
kinds of
bailment.

I. As to the first (depositum) to constitute a deposit, the subject-matter must be in the actual or constructive possession or under the control of the bailee, and he must consent to take charge of it. The bailee has no right to use the thing deposited; but so long as he holds it rightfully, he is only answerable for great neglect—for the want of that ordinary care which men of common prudence generally exercise upon their own

Responsibility
of the dif-
ferent kinds
of bailees.
I. Depositum.

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affairs—unless he spontaneously and officiously offered to keep the goods. And the bailee will not be answerable even for gross neglect, if the bailor knew him to be such a person that ordinary care could not reasonably be expected from him. (Ad. Con. 770-2; Broom, Com. 917-9; Chit. Con. 391; 1 Sm. L. C. 172-5, 189-90; *Giblin v. McMullen*, L. R. 2 P. C. 317, 337; *Ultzen v. Nicolls*, (1894) 1 Q. B. 92.) **886**

II. Commo-
datum.

II. As to the second (commodatum), the bailee or borrower is answerable for the least neglect, as the bailment is wholly for his benefit, but not for reasonable wear and tear, or for robbery, or unavoidable casualty, unless he improperly keeps the chattel after its return is requested. And the lender is responsible for defects, known to him and not to the borrower, which make the loan perilous, but not for defects not known to the lender. (Broom, Com. 920; 1 Sm. L. C. 175-6, 190; Ad. Con. 726-30; Chit. Con. 393; *MacCarthy v. Young*, 6 H. & N. 329.) **887**

When money is paid into a bank, it amounts to a loan to the banker for use and consumption by him, so that the identical money ceases to be the money of the customer, and becomes the money of the banker, of which he may make any use he pleases so long as he renders an equivalent amount when demanded. (Ad. Con. 780; 1 Sm. Mere. Law, 665.) **888**

III. Locatio
et conductio.

III. As to the third (locatio et conductio), the bailee is bound to take all ordinary care. The owner must bear the risks to which the chattel is naturally liable, but not risks occasioned by want of ordinary care on the part of the hirer. (Ad. Con. 723; 1 Sm. L. C. 176-7, 190-1; Chit. Con. 403.) **889**

The hirer, or a person to whom a chattel is delivered to be repaired, made up, or dealt with in the way of

his trade, is not responsible for robbery, disease, or accident, which happens without his fault. (Ad. Con. 723, 824.) **890**

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IV. As to the fourth kind of bailment (*vadium* or *pignori acceptum*), the bailee is only required to use ordinary care for restoring the chattels, unless a tender of the money has been made. But if he retains them after such tender, he will be responsible for them at all events. (Ad. Con. 754; 1 Sm. L. C. 177-8, 191-7; Broom, Com. 922-6; Chit. Con. 394-5.) **891**

IV. *Vadium.*

V. As to the fifth (*locatio operis faciendi*), if the bailee exercises a public employment for pay, as in the case of a common carrier, he will be answerable at all events; subject to certain exceptions. (Ad. Con. 938-9, 943; Broom, Com. 930-1; 1 Sm. L. C. 178-9, 200-27. See *infra*, Part II. Tit. II. Chap. VII.) **892**

V. *Locatio operis faciendi.*

But, in general, a private bailee to whom things are delivered, in order that they may be carried, or that something may be done about them, for a reward, is only obliged to use ordinary care (*a*). If lost, however, the loss itself affords the strongest presumption of negligence; and it is for the bailee to rebut this presumption by evidence. (1 Sm. L. C. 197-9; Broom, Com. 922; Chit. Con. 397.) A restaurant keeper is bound to take reasonable care of a customer's coat, if his servant has taken charge of it. (*Ultzen v. Nicolls*, (1894) 1 Q. B. 92.) **893**

Persons who are paid for taking care of, and not merely for finding a place of deposit for living animals, goods, or chattels intrusted to them for that purpose (such as warehousemen and wharfingers), are bound to

(a) As to robbery, disease, or accident, see *supra*, par. 890.

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CHAP. VI.

take the same care of them which the most careful of men take of their own property. And they are, *primâ facie*, responsible for a theft committed by their own servants, and can only discharge themselves by showing that the greatest care on their part could not have prevented the theft (*a*). (Chit. Con. 397-8; *Brabant v. King*, (1895) A. C. 632.) **894**

VI. Mandatum.

VI. As to the sixth species of bailment (*mandatum*), if a man acts by commission for another gratis, and behaves himself with great negligence, he is answerable. But such a bailee (who is called a mandatory) may revoke his promise to act, if he revokes it and returns the chattel without delay, and before any injury has arisen from his first accepting and then declining the trust. (*Coggs v. Bernard*, 1 Sm. L. C. 167, 179-82, 227-30; Broom, Com. 917, 919; Chit. Con. 392; Ad. Con. 788-9.) **895**

The mandatory may recover any expenses which he necessarily incurs, as money expended by him for the use of the mandator at his implied request. (Ad. Con. 793.) **895a**

Special qualified property of a bailee, and lien.

A bailee has, together with the possession, a special qualified property, enabling him to maintain an action against such as injure or take away the chattels. And he has also, in certain instances, that right of retaining possession which is called a lien. (2 Ste. Com. 89; Ad. Con. 829. See *supra*, pars. 812-25.) **896**

When bailee can set up *jus tertii*.

A bailee cannot set up the *jus tertii*, or right of a third person to the goods, as a defence in an action by the bailor for the recovery of the goods, unless he can show that he is defending the action on behalf and by the authority of such third person; and he

(a) As to robbery, disease, or accident, see *supra*, par. 890.

is then under the necessity of proving the title of the third person. Where conflicting claims to the goods are made by the bailor and another, interpleader proceedings are the proper and safest course for the bailee to adopt—i.e., he should take out a summons asking the Court to decide which of the two has the better claim. (*Biddle v. Bond*, 6 B. & S. 225; *Rogers v. Lambert*, (1891) 1 Q. B. 318.) **896a**

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CHAPTER VII.

CARRIERS, PASSENGERS, AND OWNERS OF LUGGAGE.

PART II.
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CHAP. VII.

Definition of
a common
carrier.

IN general, a common carrier is one who plies between certain termini, whether by land or by water, and regularly undertakes, for a pecuniary remuneration, to transport the goods of all such as choose to employ him (*a*). **897**

Of this description are the proprietors of stage-waggon and coaches carrying goods, barge owners, possessors of ships and boats engaged generally in the conveyance of goods for hire, and canal and railway companies, unless the Act constituting them limits their liability. (Sm. Merc. Law, 301; Chit. & Tem. on Car. 14-8; 1 Rose. 601-2; Chit. Con. 408; Ad. Con. 931-2.) **898**

Duty of
carriers.

Every common carrier is under a legal obligation to carry all things belonging to the description of articles which he publicly professes to carry, and he is bound to do so for any one who is ready to pay him (in advance if desired) his customary hire; provided he has room for the things in his cart or carriage to convey them in

(*a*) See references at end of next paragraph. And see *Nugent v. Smith*, 1 C. P. D. 19; *ibid.* (Ap.) 423. In the *Liver Alkali Company v. Johnson*, L. R. 7 Ex. 267; 9 Ex. (Ex. Ch.) 338, it was held that a bargeman who let out his barges was a common carrier, and responsible as such, though he did not let a barge to more than one person for the same voyage, and he did not ply between any fixed termini, if he let out his barges for the conveyance of the goods of any person who applied to him.

safety. But he may, if he pleases, carry, under a special contract limiting his liability, anything which he does not usually profess to carry. The hire for such goods as he usually professes to carry must be at a reasonable rate. (Ad. Con. 932-3; Broom, Com. 933; 2 Ste. Com. 92-5; 1 Rose. 602-3; Chit. Con. 408-9.)

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899

A carrier is not at liberty to refuse to carry on the ordinary terms. But it would seem that if it is sought to impose upon him a liability of an extraordinary nature, arising out of peculiar circumstances, he is entitled to decline to carry, unless he is paid a higher rate of carriage. And where sufficient notice is given to him of the special circumstances, and he consents nevertheless to carry the goods, he will in general be liable, on the ground of implied contract, for the extraordinary damages arising out of such circumstances. (See remarks of Pigott, B., and Lush, J., in *Horne v. Midland Ry. Co.*, L. R. 8 C. P. (Ex. Ch.) 143, 145; also of Cockburn, C. J., in *Simpson v. London & N. W. Ry. Co.*, 1 Q. B. D. 274, 277; and see *The Parana*, 2 P. D. 118, 120.) **900**

A carrier is not bound to convey goods by the shortest route, but only by the route by which he usually carries them, and which he professes to go; and he may charge accordingly. (*Myers v. London & S. W. Ry. Co.*, L. R. 5 C. P. 1.) **901**

Every common carrier of passengers with luggage is bound to carry for them such things as are usually taken as luggage by persons travelling. But he is not bound to carry articles of another kind, such as merchandise, unless he professes to carry them, or unless the traveller tenders or is ready to pay the customary hire for them. And a carrier has a right to limit the

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weight and bulk of that which he professes to carry. (Ad. Con. 935 ; 1 Rose. 625-7 ; Chit. & Tem. on Car. 282-3, 286.) **902**

It is the duty of a common carrier to take proper care of the goods he carries ; and to make a safe delivery of them to the consignee or some person expressly or impliedly authorized by him to receive them ; and to make such delivery at the time agreed, or, in the absence of any stipulation in that respect, within a reasonable time, unless prevented by circumstances beyond his control. (Sm. Merc. Law, 303 ; Ad. Con. 933 ; 1 Rose. 602, 618 ; Chit. & Tem. on Car. 34, 86, 89, 91, 291 ; *Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385.) **903**

Damages for
non-delivery
within the
agreed time.

Whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to be within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object, owing to the carrier's fault. Hence, a railway company are liable for loss of time and loss of profit from non-delivery of goods within the time agreed on, where they knew or ought to have known the object for which the goods were sent. (*Simpson v. London & N. W. Ry. Co.*, 1 Q. B. D. 274, 277.) **904**

Responsi-
bility of
carriers of
goods.

At Common Law a carrier is in the nature of an insurer of the goods he carries until they reach the place to which they are consigned, though not of the persons of passengers. And the law, independently of any contract, renders every common carrier responsible for loss of the goods from any cause, except from the negligence of the owner, or from their very nature,

their quality, their inherent vice or defectiveness, or their peculiar tendency or liability, or from acts of God, or acts of enemies of the Sovereign. Even in these cases the carrier will be liable if the loss might have been averted by reasonable care on his part. By the term "act of God," is meant something independent of the act of man; such as storms, gusts of wind, lightning, inundations, sudden death or illness, and accidents not resulting from human agency. "Inherent vice" may arise from the nature of the goods themselves, as where perishable goods deteriorate, or from the personal neglect of the owner, as where goods are not properly packed. With the above exceptions, a carrier is liable for loss even by robbery, or where the danger or accident may have been unavoidable, and there may have been no negligence on the carrier's part. (Ad. Con. 538-42; Broom, Com. 931-2; 1 Rose. 602-3; 2 Ste. Com. 92-3; *Kendall v. London & S. W. Ry. Co.*, L. R. 7 Ex. 373; *Blower v. Great Western Ry. Co.*, L. R. 7 C. P. 655; *Nugent v. Smith*, 1 C. P. D. 19; *ibid.* (Ap.) 423.) **905**

The owner of a British sea-going ship is, however, not liable to make good loss of cargo arising from an accidental fire (Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 502); and a common carrier is not responsible for delay in the delivery of goods where such delay is occasioned by causes which are beyond his control. (*Taylor v. Great Northern Ry. Co.*, L. R. 1 C. P. 385.) **906**

When the carrier has given notice of the arrival of the goods at the place to which they were consigned, and the consignee does not fetch them, the liability of the carrier, as such, ceases; and he then becomes liable as an ordinary bailee; and if the goods are bulky, he

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is entitled to rent as a warehouseman. His liability as an insurer ceases; but he is bound to take reasonable care of the goods as a bailee. And the words "at owner's sole risk," do not exempt him from this obligation. (*Mitchell v. Lancashire, &c., Ry. Co.*, L. R. 10 Q. B. 256.) He is entitled to recover from the owner of the goods all reasonable expenses incurred in so keeping the goods. (*Great Northern Ry. Co. v. Swaffield*, L. R. 9 Ex. 132.) **907**

Where goods are sent by rail, "to be left till called for," there, as soon as a reasonable time for an application for delivery of the goods has passed, the responsibility of the company, as carriers, ceases, and is exchanged for that of warehousemen; so that if they are destroyed by an accidental fire the company are not liable. (*Chapman v. Great Western Ry. Co.*, 5 Q. B. D. 278.) **908**

If a carrier follows the usual course of business as regards delivery, and it is not inconsistent with the consignor's directions, he will not be responsible, though he deliver, at the address named by the consignors, to the order of a fictitious consignee, who has imposed on the consignors. (*M'Kean v. M'Ivor*, L. R. 6 Ex. 36.) **909**

After a refusal of the goods at the consignee's address, carriers are involuntary bailees, and are only bound to act with reasonable care and caution in regard to them. (*Heugh v. London & N. W. Ry. Co.*, L. R. 5 Ex. 51.) **910**

A common carrier of passengers only, who receives occasionally and gratuitously, and at his own option, some article of luggage for the accommodation of a passenger, is only answerable as a gratuitous bailee of such articles, and not as a common carrier of goods.

This is the case with an omnibus proprietor. (Chit. Con. 408.) **911**

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If things are entrusted to a common carrier, which, from their intrinsic value or their destructible nature, require peculiar care, but the carrier is not apprised of that fact, he is bound only to take that ordinary care of the things which their general appearance seemed to require. (Ad. Con. 941; Chit. & Tem. on Car. 10, 49, 50.) **912**

If a person employs a carrier to convey a dangerous article, he is bound to acquaint the carrier with the dangerous nature of the article: otherwise he will be answerable for any accident arising from it to the carrier or those who are concerned in the carriage of it. (*Farrant v. Barnes*, 11 C. B. (N. S.) 553.) **913**

Dangerous
articles.

The carriage of dangerous goods is restricted and regulated by certain statutes (e.g., 38 & 39 Vict. c. 17). **914**

In consequence of the hardship of having, at common law, to carry as insurers goods of any size and value, it became a common practice for carriers to publish notices to the effect that they would not be liable for property above a certain value, unless the nature and value of the property was declared, and an increased charge paid. Hence, questions arose as to the construction of these notices, and whether they had been brought to the knowledge of the persons forwarding goods. To remedy these difficulties the Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV. c. 68), was passed. By this Act no common carrier by land is liable for the loss of, or injury to, gold or silver, plated articles, precious stones, jewellery, watches, clocks, trinkets, bills, notes, securities, stamps, maps, writings, pictures, glass, china, silks, furs, or lace, when the value exceeds 10l.; unless

Carriers Act.

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the value and nature of such articles have been expressly declared at the time of delivery to the carrier, and the increased charge for care (which must be clearly notified in the office of such carrier), or an engagement to pay it, shall have been accepted by the person receiving the parcel. And he is entitled to this exemption from liability, notwithstanding a special contract, unless such contract contains anything inconsistent with that exemption. This Act, however, does not protect any such common carrier, when he does not notify or does not demand the increased charge; nor does it protect him from liability to answer for loss or injury resulting from his own misfeasance, or from the felonious acts of any servant in his employ, or protect the servant himself from any liability *ex delicto*. The carrier must, if required, give a receipt for the amount paid for the carriage. But he is not concluded, as to the value of any parcel, by the value declared, but may demand proof of the actual value. (Broom, Com. 934-7; 1 Rose. 607-11; Ad. Con. 942-5; Chit. Con. 418-25; 2 Ste. Com. 93-4; 11 Geo. IV. & 1 Will. IV. c. 68, ss. 1-3, 8, 9; *Behrens v. Great Northern Rail. Co.*, 6 Hurl. & Norm. 366; *Baxendale v. Great Eastern Rail. Co.*, L. R. 4 Q. B. (Ex. Ch.) 244; *Anderson v. London & N. W. Rail. Co.*, L. R. 5 Ex. 90; *Whaite v. Lancashire, &c., Rail. Co.*, L. R. 9 Ex. 67; *Morrill v. North Eastern Rail. Co.*, 1 Q. B. D. 302; *Millen v. Brasch*, 10 Q. B. D. 142.) **915**

If a notice is affixed in the carrier's office in accordance with the Act, all persons sending parcels, containing such valuable articles as aforesaid, are bound by such notice, without further proof of the same having come to their knowledge. (11 Geo. IV. & 1 Will. IV. c. 68, s. 2.) **916**

In an action against a railway company, for loss of goods, upon an issue that the loss arose from the felonious acts of the defendants' servants, and therefore that they were not protected by the above enactment in the Carriers Act (though the goods were worth more than 10*l.*, and the value was not declared), it is sufficient to prove facts which render it probable that a felony was committed by some one or other of the defendants' servants: it is unnecessary to give such evidence as would suffice to convict a particular servant. (*Vaughton v. London & N. W. Rail. Co.*, L. R. 9 Ex. 93; *M^cQueen v. Great Western Rail. Co.*, L. R. 10 Q. B. 569.) **917**

As to parcels or packages of lace delivered after the 30th September, 1865, the term "lace" does not include machine-made lace. (28 & 29 Vict. c. 94.) **918**

Carriers cannot, by the mere effect of a public notice, limit their liability at Common Law to answer for the loss of any articles other than those enumerated in the Carriers Act. (Sm. Merc. Law, 308; 2 Ste. Com. 93; Ad. Con. 945-6; 1 Rose. 608; 11 Geo. IV. & 1 Will. IV. c. 68, s. 4.) **919**

Limiting
liability by
notice, con-
tract, or con-
ditions.

A carrier may, however, enter into a special contract, limiting his liability. (Chit. Con. 410, 423; 1 Rose. 604, 608; Ad. Con. 946; 11 Geo. IV. & 1 Will. IV. c. 68, s. 6; *Scaife v. Farrant*, L. R. 10 Ex. (Ex. Ch.) 358.) With regard to articles such as the common carrier is bound by his public profession to carry, the owner has a right to insist that the common carrier shall receive the goods subject to all the responsibilities incident to his employment. (Ad. Con. 946.) But as to the carriage of such articles as he does not publicly profess to carry, or such as are attended with peculiar inconvenience or risk (such as living animals, alabaster, toys, furniture, &c.), he may, by a special contract, in

express and unambiguous terms, throw the entire risk on the owner, even notwithstanding the negligence of himself or his servants. (Ad. Con. 946.) And a carrier may enter into a special contract as to the carriage of articles of the value of upwards of 10*l*. at the ordinary rate, and on the terms of a limited responsibility. (Ad. Con. 946; Chit. & Tem. on Car. 77.) **920**

Railway companies were in the habit of limiting their liability by special contracts, and questions arose as to the meaning of such contracts, and whether they were brought to the notice of the consignors. Accordingly, by the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, it was enacted that railway and canal companies should be liable for loss or injury to goods or other things on their own lines, or on lines worked by them, occasioned by the negligence or default of such companies or their servants, notwithstanding any notice, condition, or declaration made or given by such companies, contrary thereto, or limiting such liability. The company, however, may make such conditions as to receiving, forwarding, and delivering goods or animals as the Court or judge before whom any question relative thereto is held, may deem just and reasonable. And the company will not be answerable in more than a certain sum for certain animals (i. e., 50*l*. for a horse, 15*l*. for neat cattle per head, 2*l*. for sheep and pigs per head), unless notice be given that they are of higher value, and an increased sum be paid for them. No special contract between the company and any other party limiting their liability for loss or damage on their own line, or lines worked by them, will be binding upon them unless signed by him or by the person delivering the property. (17 & 18 Vict. c. 31, ss. 2, 7; Sm. Merc. Law, 311-3; 1 Rosc. 611-5; Ad. Con. 957-9; Chit. Con.

429-34; *Peek v. North Staffordshire Rail. Co.*, 10 H. L. C. 473.) **921**

It would seem that the interpretation of the Act is, that such a special contract must not only be just and reasonable, but also be embodied in a written contract. (*Peek v. North Staffordshire Rail. Co.*, 10 H. L. Cas. 473.) The words "neglect and default" in the first clause of sect. 7 do not include a loss by the theft of a servant of the company, so that a company can at common law protect themselves against liability for such theft by a special contract, although such contract be not just or reasonable. (*Shaw v. Great Western Rail. Co.*, (1894) 1 Q. B. 373.) **922**

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, applies to passengers' luggage, both as regards the reasonableness of a condition and the contract containing it being signed. And by the Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119, s. 16), the provisions of s. 7 of the former Act are extended to traffic carried on by steam vessels and by railway companies. (*Cohen v. South Eastern Rail. Co.*, 1 Ex. D. 217; 2 Ex. D. (Ap.) 253.) **923**

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, does not apply to cases of loss or damage on lines which do not belong to or are not worked by the company entering into the contract. And in such cases the special contract between the company and the person delivering the property need not be signed by the latter, but merely assented to by him, and such assent may be inferred from the circumstances of the case. (*Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Parker v. South Eastern Rail. Co.*, 2 C. P. D. 416.)

924

When a common carrier receives a parcel addressed Carriage of

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parcels
beyond limits.

to a place beyond the limits of his customary journey, and he does not expressly limit his responsibility to his customary journey, he is responsible for the whole distance, though he may have forwarded the goods by another carrier. And this rule applies to railways. (Ad. Con. 968; 1 Rose. 605-6; Chit. & Tem. on Car. 23-88, 128.) **925**

Equality
clauses.

Under equality clauses in various Acts railway companies are bound to charge equally to all persons in respect of all goods. **925a**

Responsi-
bility of
carriers of
passengers.

Every carrier of passengers for hire is answerable for the least want of forethought, skill, or care in himself or his servants and agents, and for any accident arising from the discoverable defectiveness of his conveyance, horses, or equipments, but not for unforeseen misfortunes which forethought, skill, and care could not have prevented, or which arose immediately from the fault of the passenger himself. (1 Rose. 622; Chit. Con. 417; Ad. Con. 928-30.) He is not an insurer, like a carrier of goods, and hence he is not liable for a latent defect, which no care or skill could have detected either in the manufacture, purchase or use. (*Readhead v. Midland Rail. Co.*, L. R. 4 Q. B. (Ex. Ch.) 379.)

926

It is not the natural consequences of the overcrowding of a railway carriage that a passenger should be assaulted or robbed, and the railway company will not therefore be liable. If a passenger is robbed, a stationmaster is not bound to stop the train till the men charged with the robbery can be searched. If there is a duty on the company, it is to public justice, and not to the passenger. (*Pounder v. North Eastern Rail. Co.*, (1892) 1 Q. B. 385; *Cobb v. Great Western Rail. Co.*, (1893) 1 Q. B. 459.)

927

If a railway engine is driven at an unusual and dangerous speed, or any accident arises from the defectiveness of the engines, carriages, rails, or works, or from the defective state of the railway, or from negligence or unskilfulness on the part of the company or their servants, or the want of anything necessary for the safety of the passengers, the railway company are responsible for all damages and injuries which the passengers sustain through these causes, though there may have been contributory negligence or fault on the part of third persons. And a company undertaking to carry passengers over another line are answerable for negligence happening on it as much as if it happened on their own line. So that a railway company are liable to a passenger for an accident caused by negligence of another company over whose line they have running powers. (Ad. Con. 929; 1 Rose. 622-3; Chit. Con. 439-44; *Fordham v. London, Brighton & S. C. Rail. Co.*, L. R. 3 C. P. 368; 4 C. P. (Ex. Ch.) 619; *Jackson v. Metropolitan Rail. Co.*, 3 App. Cas. 193; *Foulkes v. Metrop. District Rail. Co.*, 5 C. P. D. (Ap.) 157.) **928**

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Responsi-
bility of
railway com-
panies in
cases of
accident.

The action for negligence in carrying a passenger is an action "founded on tort" within the meaning of s. 116 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), and not upon contract, even although the passenger has taken a ticket; but the duty of the company arises out of its contract, so that there is no duty to protect a passenger against extraordinary danger or from unknown peculiarities of his own. (*Kelly v. Metropolitan Railway*, (1895) 1 Q. B. 944.) **929**

Action for
injury to
passengers is
action in tort.

Unless there be an intention in the passengers to defraud, the mere non-payment of fare will not, it seems, exempt the company from liability; thus, a railway company was held responsible for an injury

sustained by a child travelling with its mother, although no separate fare had been paid for the child and the child was above the age when children are carried free. (*Austin v. Great Western Rail. Co.*, L. R. 2 Q. B. 442.)

930

In all cases of negligence the contributory negligence of the plaintiff will disentitle him to recover. **931**

If passengers are invited to alight when it is dangerous for old and infirm persons or women to do so without aid, and no aid is at hand, and they are in fear of being carried on, the company are responsible for any accident which happens to them in alighting. (*Robson v. North Eastern Rail. Co.*, 2 Q. B. D. 85.) If, however, a train or a part of it, overshoots a platform, or does not come far enough, from being too long, or from some other cause, and the danger is visible, and there has been no invitation to alight, the company are not liable if a passenger does not call to the officials present to bring steps, or to back or advance the train, or otherwise to assist him, but injures himself by getting down. (*Siner v. Great Western Rail. Co.*, L. R. 4 Ex. (Ex. Ch.) 117.) **932**

Neither a porter's calling out the name of the station, nor stopping the train at a station, amounts of itself, nor do both combined amount, to an invitation to a passenger to alight, unless he is opposite the platform, and there is no visible cause of danger. What amounts to an invitation to alight depends upon the circumstances of each case. (*Bridges v. North London Rail. Co.*, L. R. 7 H. L. 213; *Cockle v. London & S. E. Rail. Co.*, L. R. 7 C. P. (Ex. Ch.) 321; *Robson v. North Eastern Rail. Co.*, 2 Q. B. D. 85.) **933**

But if the train has come to a permanent stand at a station, and no sufficient warning is given to the pas-

sengers not to alight, and the danger is in the nature of a trap, from the want of light or other cause, the company will be liable if a passenger sustains an injury in getting out. (*Robson v. North Eastern Rail. Co.*, 2 Q. B. D. 85.) **934**

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Railway companies receive passengers' luggage as insurers, and receive it up to a certain weight for nothing. The Carriers Act, 1830 (11 Geo. IV. & 1 Will. IV.), and the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, include passengers' luggage. Railway companies, therefore, are responsible for the conduct of their servants in regard to passengers' luggage, and for its safe delivery into the hands of the passenger or his agent or servant, unless they are expressly exempted by their special Acts of Parliament. Thus, the company are responsible for luggage delivered to one of their servants that it may be labelled and placed in the luggage van, and for luggage openly taken by a passenger into the same carriage with himself; and the company's responsibility will continue until the porters have placed the luggage, at the end of the journey, on the vehicles by which it is to be taken away, unless the passenger accepts a shorter delivery, or the porter was specially employed by the passenger to convey the luggage to the vehicle. (*Broom, Com.* 944-5; 1 *Rosc.* 625-7; *Ad. Con.* 950-2, 967; *Chit. Con.* 434.) **935**

Responsi-
bility of
railway com-
panies for
luggage.

It is the duty of a railway company to have the passenger's luggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can ask for and receive it; and it is the owner's duty to ask for and remove it within a reasonable time. (*Patscheider v. Great*

Western Rail. Co., 3 Ex. D. 153; *Hodkinson v. London & N. W. Rail. Co.*, 14 Q. B. D. 228.) **936**

But where a passenger's luggage is placed by him, or by the company's servants at his request, in the carriage in which he is travelling, and so out of the immediate and active control of the company's servants, instead of being in the luggage van, where it would be under such control, the company's contract to carry it safely as insurers is subject to an implied condition that the passenger shall take such reasonable care of it as might be expected from an ordinarily prudent man; and the company are not liable if loss is occasioned by the passenger's own default. (*Bergheim v. Great Eastern Rail. Co.*, 3 C. P. D. 221; *Great Western Rail. Co. v. Bunch*, 13 App. Cas. 31.) **937**

If a passenger by rail takes with him articles which are not personal luggage, and the company are not paid for carrying them, and their servants are not aware of their nature, the company are not responsible for the articles, if lost. But if the company choose to take merchandize as luggage they cannot, if the articles are lost, escape liability on the ground that they are merchandize. (*Cahill v. London & N. W. Rail. Co.*, 10 C. B. (N. S.) 154; 13 C. B. (N. S.) 818; *Phelps v. London & N. W. Rail. Co.*, 19 C. B. (N. S.) 321; *Hudston v. Midland Rail. Co.*, L. R. 4 Q. B. 366.) **938**

Passenger luggage or personal luggage would seem to be luggage which it is only consistent with the reasonable convenience of the public and the railway companies should be taken by passengers in general, or by passengers of a given description. Thus, it would include not only clothes and other things which are commonly taken for personal use on a journey, but also those articles purchased by passengers, which, as a

matter of convenience or safety, most passengers would take with them from the places where they had bought them, and which could be taken without greater inconvenience to the railway company or other passengers than other ordinary personal luggage. (On this subject see *Macrow v. Great Western Rail. Co.*, L. R. 6 Q. B. 612; *Meux v. Great Eastern Rail. Co.*, (1895) 2 Q. B. 387.) **939**

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Railway companies are bound to afford a cloak room for the use of passengers, and, therefore, goods received by a railway company in such cloak room are received by them as common carriers, and not as warehousemen, and may be retained by them, even against the true owner, until their lien for their charges has been discharged. (*Singer Manufacturing Co. v. London & South-Western Rail. Co.*, (1894) 1 Q. B. 833.) **940**

But the depositor must have reasonable notice of the terms. Thus, the recipient of a ticket is not bound by conditions on the back of it if he did not know they were on it. (*Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470.) But where there is enough on the face of it, or in the nature of the case, to lead him to read the part on which a condition is printed, the recipient is bound to read the condition. (*Burke v. South Eastern Rail. Co.*, 5 C. P. D. 1. See, also, *Parker v. South Eastern Rail. Co.*, and *Gabell v. South Eastern Rail. Co.*, 1 C. P. D. 618; 2 C. P. D. (Ap.) 416.) **941**

As a rule the contracting party alone can sue the carrier in respect of a cause of action arising out of a contract for the carriage of goods. (1 Rose. 606.) **942**

Party to sue
carrier in
contract.

But although there be no privity of contract between a person and a railway company, yet he may sue the company for an injury done to his luggage or goods by a tort independent of contract through the negligence

Action of
tort against
a railway
company.

of their servants, whilst the same were in their custody. (*Martin v. Great Indian Peninsular Rail. Co.*, L. R. 3 Ex. 9.) But no person not a party to the contract, other than the passenger, can sue for an injury to his luggage or goods, except for a tort independent of contract. (*Berringer v. Great Eastern Rail. Co.*, 4 C. P. D. 163.) **943**

A servant's livery is his luggage although it is the property of the master, but the master can sue in tort for damage done to it although the contract of carriage was made with the servants alone. (*Meux v. Great Eastern Rail. Co.*, (1895) 2 Q. B. 387.) **944**

Generally speaking, when goods are delivered by the seller to a carrier to be forwarded to the buyer, the property vests in the buyer, and he is, therefore, the proper party to sue the carrier for the loss or non-delivery of the goods, or for any injury done to them. But where, by the contract between the consignor and the carrier, the latter agrees to deliver the goods to a particular person at a particular place, the consignor may sue the carrier, although the goods may be the property of the consignee; and when the property in the goods has not passed to the buyer, e.g., when they are sent merely on approval, the consignor may sue. (Chit. Con. 415-6; Ad. Con. 577.) **945**

As to carriers by sea, see pars. 957-1012, below. **946**

CHAPTER VIII.

SHIPOWNERS AND CHARTERERS (*a*).

WITH the exception of certain small coasting vessels, ships must be registered, in order to have the privileges of British ships, i. e., the right to assume the national flag and character, and the right to the protection that it affords. (57 & 58 Vict. c. 60, ss. 2-3.) **947**

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Registration.

The property of every British vessel is to be considered as divided into sixty-four equal parts or shares; and no person can be registered as owner in respect of a fractional part of a share or any proportion not being a sixty-fourth part. **948**

Shares in a
ship, and
number of
registered
shareholders.

No more than sixty-four individuals are entitled to register at the same time as legal owners of any one ship. But any number of persons, not exceeding five, may register as joint owners of the ship, or any share in her; and these joint owners, whether entitled by purchase or transmission, are to be considered as constituting one person in reckoning the number of persons entitled to be registered, and they cannot dispose in severalty of their respective proportions of their joint property. **949**

Still, these rules do not affect the equitable or beneficial title of persons represented by or claiming through any registered owner; but no notice of a trust can be entered on the register. (57 & 58 Vict. c. 60, ss. 5, 56-7.) **950**

(*a*) The statute which consolidated the Acts relating to Merchant Shipping is the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

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Certificate of
registry.

A certificate of registry embodying the registered particulars of the vessel, with an indorsement of the names of the owners and their shares, is the evidence of the ownership of a registered vessel. **951**

Mode of
transfer.

A registered ship or shares therein can only be transferred by bill of sale, in a prescribed form given in the Merchant Shipping Act, 1894, executed in the presence of and attested by at least one witness, and registered by the registrar of the port at which the ship is registered. (57 & 58 Vict. c. 60, s. 24.) **952**

Certificate of
sale.

The registrar may grant to the owners of a ship a certificate of sale or mortgage, authorizing persons specified in it to dispose of it by sale or mortgage out of the United Kingdom. (57 & 58 Vict. c. 60, s. 39.) **953**

Mortgages.

A mortgage or transfer of a mortgage of a British ship or any share in her must be in a specified form given in the Merchant Shipping Act, 1894, and attested and registered. **954**

In case more than one mortgage of the same ship or share is registered, the mortgagees, notwithstanding any notice, have priority according to the date of registration. Every registered mortgagee may dispose of the ship or share mortgaged; but no subsequent mortgagee may do this without the concurrence of every prior registered mortgagee, except under the order of some competent Court. (57 & 58 Vict. c. 60, ss. 33, 35.) **955**

Discharged
mortgage.

When a mortgage is discharged, satisfaction is to be entered on the registry. (57 & 58 Vict. c. 60, s. 32.) **956**

Contracts of
affreight-
ment.

Contracts for the carriage of goods in vessels are either contracts by charter-party or contracts for the conveyance of goods in a general ship, in which case the contract of affreightment is evidenced in a document

called a bill of lading. (1 Sm. Merc. Law, 322 ; **957** PART II.
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Abbott, 119 ; Scrut. 1.)

A charter may operate as a demise or lease of the ship itself. The charterer here becomes the owner of the vessel, and the master and the crew are his servants. Or it may be a contract for conveyance by a particular vessel, together with the use of the vessel and the services of the owner, master, and crew. In this case the ownership of the vessel remains in the original owner, and the master and crew continue to be his servants. (Scrut. 2-3.) Whether a charter-party is a demise or not depends upon the terms of the contract. The test is whether the owner has by the charter parted with the whole possession and control of the ship or not. (*Baum-
roll v. Gilchrest*, (1892) 1 Q. B. at p. 259 ; (1893) A. C. 8.) **958**

A charter-party not by demise is a contract by which a shipowner agrees to place a ship or a part of a ship at the disposal of a merchant for the conveyance of goods binding the shipowner to convey them to a certain place in consideration of a sum of money which the merchant undertakes to pay for their carriage. It is often, but not necessarily, a deed, and is executed by the owner of the ship, or the master, or some other agent of the owner. (2 Ste. Com. 141-2 ; Sm. Merc. Law, 322-3.) **959**

The terms of a charter-party cannot be varied by parol evidence, but it may, like other mercantile instruments, be explained, though not contradicted, by evidence as to usage of trade and the intention of the parties. (1 Sm. Merc. Law, 325 ; *Cuthbert v. Cuming*, 11 Ex. 405.)

960

The provisions of the charter-party consist of either conditions precedent, the breach of which by one party

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entitles the other to rescind the contract, or collateral promises, the breach of which gives rise to a cause of action and a right to damages. (1 Sm. Merc. Law, 326-7.) **961**

Conditions precedent.

Statements in a charter-party as to (1) name of ship, (2) ship's class of register if stated, (3) nationality of ship, (4) locality of ship, (5) readiness to load, have been held to be conditions precedent. (1 Sm. Merc. Law, 326-7; *Behn v. Burness*, 3 B. & S. 751.) **962**

Cancelling clause.

There may be a condition precedent in a charter-party, that should the ship not have arrived at the first port of lading, ready to load on or before a day fixed, the charterer shall have the option of cancelling or confirming the charter-party. **963**

Waiver of condition precedent.

The right to cancel on the ground of breach of a condition precedent may be waived by conduct, e. g., receiving benefit under the contract after knowledge of the breach. (*Pust v. Dowie*, 5 B. & S. 20; *Bentsen v. Taylor*, (1893) 2 Q. B. 274.) **964**

Meaning of freight.

The sum paid for the hire of the ship is calculated at so much per ton or per month, and is called the freight. (Scrut. 245, 368-79; 2 Ste. Com. 143.) **965**

Lump freight.

"Lump freight" is a gross sum stipulated to be paid for the use of the entire ship, and is payable though no goods are shipped. **966**

Who pays freight.

Freight may be payable by : 1. The shipper ; 2. The consignee ; 3. The holder of the bill of lading. (Scrut. 253, 270-3.) **967**

Shipper, charterer, freighter, owner.

The merchant who ships the goods is called the shipper, charterer, or freighter, and the ship is said to be freighted by him. **968**

The owner usually signifies the shipowner, not the owner of the goods. (Sm. Merc. Law, 337.) **969**

Contract of

Where the contract of affreightment does not provide

otherwise, as between the parties to the contract, in respect of sea damage and its incidents, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves. **A** contrary intention may, however, be presumed from the form of the contract. (*Lloyd v. Guibert*, L. R. 1 Q. B. (Ex. Ch.) 115; *The August*, (1891) P. 328; *The Industrie*, (1894) P. 58.) **970**

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affreight-
ment.

Payments made in advance on account of freight cannot be recovered back, although the vessel be lost; but a sum advanced as a loan upon the security of freight is recoverable. (*Byrne v. Schiller*, L. R. 6 Ex. (Ex. Ch.) 319.) **971**

Payments in
advance on
account of
freight.

The merchant usually covenants to load and unload within a specified number of days which are called lay or running days, and to pay a daily sum for any longer time during which he may detain the ship. This sum, as well as the delay itself, is called demurrage; and it is payable even if the delay in loading or unloading was unavoidable owing to the state of the weather, or some other cause over which the freighter had no control. (Scrut. 234-44; 1 Sm. Merc. Law, 330-1; *Thijs v. Byers*, 1 Q. B. D. 244; *Porteus v. Watney*, 3 Q. B. D. 534; *Tharsis Co. v. Morel*, (1891) 2 Q. B. 647.) **972**

Demurrage.

A cesser clause is sometimes introduced into the charter-party providing that all liability on the part of the charterers shall cease as soon as they have shipped the cargo. (Scrut. 116-7; 1 Sm. Merc. Law, 336.)

Cesser clause.

972a

A contract for conveyance in a general ship is a contract by which the master or owner of a ship engages with separate merchants, or with one merchant who sub-lets her to sub-freighters, to convey their goods to the place of her destination. In this case she

Conveyance
in a general
ship.

Bill of lading.

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is called a general ship; and no charter is usually executed, but only a bill of lading, which is a document that specifies the ship and the goods shipped, and expresses that they shall be delivered at a certain place, in good order, on payment of a certain freight, with primage and average. (Abbott, 357; 1 Sm. Merc. Law, 338; *infra*, par. 1008.) **973**

Mate's
receipt.

The usual course is for the mate to give a receipt, called the "mate's receipt," to the shipper on delivery of the goods on board, and for the master (or in some cases the broker) afterwards to sign and deliver a bill of lading to the holder of the receipt, which is then returned to the master. And the shipper sends a copy or two copies of the bill of lading to the consignee, and retains one for his own use. The bill of lading is conclusive evidence of the shipment as against the master, or other person who signs it, although the goods mentioned in it, or some of them have not been shipped, except in case of fraud, but not against the owner or owners. (Abbott, 368; *Scrut.* 112; 1 Sm. Merc. Law, 339-40; *Myer v. Dresser*, 16 C. B. (N. S.) 646; 18 & 19 Vict. c. 111, ss. 2, 3.) **974**

Clean bill of
lading.

A clean bill of lading is one in which there is nothing to qualify the admission on the part of the shipowner that so many packages are shipped in good order and well-conditioned. (*Scrut.* 113-5.) **975**

Through bill
of lading.

A through bill of lading is one made for the carriage of goods from one place to another by several shipowners or railway companies. (*Scrut.* 55-8.) **976**

The bill of lading is usually made out for delivery to a particular person or his assigns; but the terms of the bill of lading or the manner in which it is dealt with may indicate an intention on the part of the consignor, especially if he be an unpaid seller, to reserve to him-

self the ownership of the goods, or the *jus disponendi*, and the right of passing it by indorsing the bill of lading, so that the property in the goods shipped does not pass to the consignee; as, if the bill provides that the goods shall be delivered to the consignor's order. (Scrut. 133-4; 1 Sm. Merc. Law, 343.) **977**

A bill of lading is, in a certain limited sense, a negotiable instrument; so that by an indorsement of it by the shipper or consignee, either to a particular person or in blank, accompanied by a delivery of it to the intended transferee, the property in the goods may be transferred, subject only to the right of an unpaid seller to stop in transitu. And the indorsee may deprive the seller of this right by indorsing the bill of lading for valuable consideration. For though the consignee named in the bill of lading become insolvent without having paid for the goods, yet, if he assigns them for valuable consideration, and the assignee had no notice of the insolvency of the consignee, the ownership of the goods passes to the assignee. By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), the indorsee of a bill of lading has all the rights and duties of the original shipper under the contract evidenced in the bill of lading. (Abbott, 702-3; 1 Sm. Merc. Law, 345-6; Scrut. 131; 56 & 57 Vict. c. 71, s. 47; *Barber v. Meyerstein*, L. R. 4 H. L. 317.) **978**

The construction of a charter or bill of lading is for the Court. Charters and bills of lading are to be construed in the light of the nature of the adventure contemplated by the parties to them, and in such a manner as will best effectuate the object of the parties. Their terms are to be construed in their popular sense, unless such terms have by usage of trade acquired a peculiar meaning. The construction of a charter or bill of

Construction
of a charter or
bill of lading.



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lading is, as has been said, for the Court; but the meaning of words used in a peculiar sense, by reason of custom of trade, is for the jury. Exceptions or clauses introduced in favour of one party to the contract are to be construed most strictly against him. (Scrut. 10-12; and see above, pars. 960-1.) **979**

Printed form
of contract.

When a charter is effected by filling in a printed form, and parts of the printed form are in contradiction to clauses written in the form, the written clauses will usually prevail. (*Glynn v. Margetson*, (1892) 1 Q. B. 337; (1893) A. C. 351; Scrut. 22-3.) **980**

Who can
make the
contract of
carriage.

A contract of carriage can be entered into by the shipowner and those authorized by him, such as the managing owner when the ship is owned by co-owners, brokers, and the captain. **981**

Who are
bound.

1. Any part owner of a ship may object to its employment in any particular way, though such employment is under a charter made by a managing owner appointed by himself. In such a case that part owner will neither share the profits nor be liable for the losses of the voyage, but will be entitled, in an action of restraint, to a bond from his co-owners to secure the value of his share in the ship before she will be allowed to sail. 2. The purchaser of a ship under charter is bound by the charter in existence, but not for losses in charters which have expired. 3. A mortgagor in possession has the powers of an ordinary owner, and the mortgagee out of possession is bound by any charter which does not impair his security. (Scrut. 36-7.) **982**

Bill of lading
differing from
charter-party.

Where the charterer is himself the shipper, and receives a bill of lading differing from the charter, the charter-party is the contract, and the bill of lading is to be taken only as an acknowledgment of the receipt of the goods. But the parties to a charter may agree to

vary it; and this agreement to vary may be expressed in the bill of lading. (Scrut. 38-42; *Rodocanachi v. Milburn*, 18 Q. B. D. 67; *Leduc v. Ward*, 20 Q. B. D. 475.) **983**

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Where the ship is demised, the owner will not be liable for bills of lading signed by the master or broker. If the owner still has possession, and the charter is not by way of demise, the captain is the servant and agent of the shipowner, and the shipowner is liable unless he can prove the shipper's knowledge of the charter. (Scrut. 42-3; *Scheibler v. Furness*, (1893) A. C. 8; *Manchester Trust Co. v. Furness*, (1895) 2 Q. B. 539.)

Liability of
shipowner.

984

The indorsee of a bill of lading is not a party to any contract besides the bill of lading. If it refers to the charter-party, and incorporates it, he is bound by the conditions of the charter-party. The indorsee will not be bound by verbal negotiations between the shipper and the carrier not embodied in the bill of lading. (Scrut. 45-7; *Leduc v. Ward*, 10 Q. B. D. 475.) **985**

Liability of
indorsee of
bill of lading.

By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 3, the bill of lading in the hands of a consignee or indorsee for value is conclusive evidence that the goods represented by it were actually shipped as against the person signing it, such as the master or broker, unless either the holder took the bill with actual notice that such goods were not on board, or the mistake was occasioned by the fraud of the shipper or holder, or person under whom the holder claims. (Scrut. 54-5.) **986**

The master may sell the ship, or a part or even the whole of the cargo, for the benefit of the owners, in cases of urgent necessity. (Abbot, 16-17; Scrut. 195; *Acatos v. Burns*, 3 Ex. D. 282.) **987**

Power to
hypotheate
or sell the
ship, freight,
or cargo.

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Where it is necessary to raise money for repairs, the master should endeavour to raise it on the credit of the owner; but if he cannot, he may hypothecate the ship or the freight; or in case he cannot raise the money in any other way, he may sell the ship or a part or the whole of the cargo. If he hypothecates the cargo, the shipowner must indemnify the merchant. If he sells it, the merchant, on the ship's safe arrival at the place of destination, may elect to receive what the goods would have fetched if brought thither, or to take the sum realised by them. (Scrut. 195, 207; Abbott, 16-17, 20.) **988**

The master ought to have the authority of the owners of the ship or cargo before he sells or hypothecates the ship or cargo, unless a sale or hypothecation is necessary before he can obtain such authority. (Scrut. 208-10; *Acatos v. Burns*, 3 Ex. D. 282.) **989**

Liability of
shipowner for
loss of, or
damage to,
goods carried.

In the absence of express stipulations in the contract of affreightment, all shipowners who are common carriers (i.e., who offer their ships as general ships for the transit of the goods of any shipper), are liable at common law for any damage to such goods in transit, unless caused by the act of God, or the Queen's enemies, or by the vice of the goods themselves. (Scrut. 161; *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; *The Xantho*, 12 App. Cas. 503; *Hamilton v. Pandorf*, 12 App. Cas. 518.) **990**

Act of God.

The exception "act of God" includes any accident as to which the shipowner can show that it is due to natural causes, and that it could not have been prevented by any foresight or care reasonably to be expected from him. Collision by negligence of another ship is a "peril of the sea," but not an "act of God." The negligence of the shipowner, or his agent, may

exclude the defence of act of God. (Scrut. 172-3; Abbott, 458-60.) **991**

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The exception of Queen's enemies only refers to states recognized as at war with the sovereign, and not to pirates or traitorous subjects. (Scrut. 173.) **992**

Queen's
enemies.

A common carrier is not liable for accidents happening through the inherent vice of the goods carried. Inherent vice may arise from the nature of the goods themselves, as where an animal injures itself by reason of fright, and consequent struggling, without any negligence on the part of the shipowner's servants (*Nugent v. Smith*, 1 C. P. D. 423); or perishable goods deteriorate; or from the personal neglect of the owner or shipper, as where the goods are not properly put up and packed. (Abbott, 475-6.) **993**

Inherent vice.

By the Merchant Shipping Act, 1894, a shipowner is not liable for any loss or damage, happening without his actual fault or privity, of any goods, by reason of fire, or of any gold, silver, diamonds, watches, or precious stones, by reason of any robbery or embezzlement, unless the owner or shipper has inserted in the bill of lading, or declared in writing to the master or shipowner, the nature and value of such articles. (2 Ste. Com. 95-6; 57 & 58 Vict. c. 60, s. 502.) **994**

Responsibility
of shipowner
under statute.

Shipowners are not liable for loss or damage caused by fault or incapacity of any pilot, when employment of such pilot is compulsory by law, and the vessel is under control of such pilot. (57 & 58 Vict. c. 60, s. 633.) **995**

Nor are shipowners answerable in damages, in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding fifteen pounds for each ton of their ship's tonnage;

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nor in respect of loss or damage to ships, goods, merchandise or other things (whether there be in addition loss of life or personal injury or not), to an aggregate amount exceeding eight pounds for each ton of the ship's tonnage; where such loss or damage arises without their actual fault or privity. (57 & 58 Vict. c. 60, s. 503.) But this limitation of liability may be excluded by express contract. (*The Satanita*, (1897) A. C. 59.) **996**

Implied
undertakings
in contract of
affreightment
by shipowner.

In whatever way a contract for the conveyance of merchandise or goods is made, where there is no agreement to the contrary, the following undertakings by the shipowner are implied: 1. That his ship is seaworthy; 2. That his ship shall commence the voyage with reasonable diligence; 3. That there shall be no unnecessary deviation. Such breaches of the undertakings as defeat the commercial purpose of the voyage will justify the hirer of the ship, or the owner of the goods carried, in repudiating the contract of affreightment. Such breaches as do not defeat the commercial purpose of the voyage will give rise to an action for damages. (Abbott, 376; 1 Sm. Merc. Law, 352-5; Scrut. 67-9; *Kopitoff v. Wilson*, 1 Q. B. D. 377, 380; *Cohn v. Davidson*, 2 Q. B. D. 455; *Steel v. The State Line Steamship Co.*, 3 App. Cas. 72.) **997**

Implied
undertaking
as to sea-
worthiness.

The seaworthiness required is relative to the particular voyage contracted for, and varies with the particular cargo contracted to be carried. (*Tattersall v. National Steamship Co.*, 12 Q. B. D. 297; *Steel v. State Line Steamship Co.*, 3 App. Cas. 72; *Thin v. Richards*, (1892) 2 Q. B. 141.) If the charterer or shipper discovers the unseaworthiness before commencing the voyage, and the ship cannot be made seaworthy in a reasonable time, he may throw up the contract of hire

or carriage. (*Stanton v. Richardson*, L. R. 7 C. P. 421, 435; 9 C. P. (Ex. Ch.) 390.) If there are different stages in the journey, the ship must be seaworthy at the beginning of each stage. Insecurity of the vessel makes her unseaworthy, as well as other matters in connection with the machinery. (Scrut. 67-77; *Dobell v. The Steamship Rossman Co.*, (1895) 2 Q. B. 408; *The Maori King v. Hughes*, (1895) 2 Q. B. 550.) **998**

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The shipowner impliedly undertakes that his vessel shall be ready to commence the voyage agreed on, and to load the cargo to be carried, and shall proceed upon and complete the voyage agreed on, in a time which is reasonable, i.e., in such a time that, in a commercial sense, the commercial speculation entered into can be carried out. (Scrut. 72-3; *Jackson v. Union Marine Insurance Co.*, L. R. 10 C. P. 125.) **999**

Implied
undertaking
of reasonable
dispatch.

The shipowner impliedly undertakes that the ship shall proceed by the accustomed route for the voyage without unnecessary deviation or delay. (Abbott, 405; Scrut. 198.) Deviation will, however, be justified if it is: 1. To save life in some other ship, but not if it is to save the property of others simply; 2. To avoid imminent peril to the ship, as by hostile capture, pirates, icebergs, or other dangers of navigation; 3. To repair the ship from the effects of accident or tempest. (Abbott, 404-11; Scrut. 198-201.) Express stipulations, limiting this implied undertaking, are usually introduced into charters and bills of lading, such as "with liberty to call at any port in any order." Such clauses must be construed in the light of the commercial adventure undertaken by the shipowner. (Scrut. 199; *Leduc v. Ward*, 20 Q. B. D. 475; *Margetson v. Glynn*, (1892) 1 Q. B. 337; (1893) A. C. 351.) **1000**

Implied
undertaking
to proceed
without un-
necessary
deviation.

By the common law the shipper of goods impliedly

Implied

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undertakings
by the
shipper.

undertakes to ship no goods of such a dangerous character, or so dangerously packed, that the shipowner or his agent could not by reasonable knowledge and diligence be aware of their dangerous character, without notice to the shipowner or his agent of such dangerous character. (Scrut. 77.) **1001**

Perils expressly excepted by stipulations in the contract.

Shipowners generally insert in their charter parties and bills of lading exceptions excusing the performance of their contract on the happening of certain stipulated events. The implied undertakings in a contract of affreightment are not affected by exceptions, unless these latter expressly negative them. (Abbott, 476-7; Scrut. 171.) Instances of exceptions are "restraint of princes," "perils of the sea," "barratry of master or mariners," "negligence of the master or other servants of the shipowner." **1002**

"Restraint of princes."

The term "restraint of princes" applies to forcible interference by a state or the government of a country taking possession of the goods by a strong hand, such as arrest or blockade. It does not include the judgments or acts of a court of law. The words apply to an actual, not a mere expected, restraint; but reasonable apprehension of capture amounts to restraint of princes. (1 Sm. Merc. Law, 328; Scrut. 174; *Nobel Explosives Co. v. Jenkins*, (1896) 2 Q. B. 326.)

1003

"Perils of the sea."

The term "perils of the sea" applies to casualties which could not be foreseen as one of the necessary incidents of the adventure. The term, whether in policies of insurance, charter parties, or bills of lading, has the same meaning, and includes any damage to the goods caused by sea-water, storm, collision (unless brought about by the negligence of the shipowner's servants), or other perils peculiar to the sea, and not

being the result of ordinary wear and tear. Perils which, though occurring on the sea, are not peculiar to the sea, such as rats eating the cargo, are not "perils of the sea." (Scrut. 176-80; 1 Sm. Merc. Law, 328-9; *Thames and Mersey Insurance Co. v. Hamilton*, 12 App. Cas. 484; *The Xantho*, 12 App. Cas. 503; *Hamilton v. Pandorf*, 12 App. Cas. 518.)

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1004

The exception of "barratry" covers any wilful act of wrong done by the master or mariners against the ship or goods without the consent of the owner, such as smuggling, intentional breach of port rules, or fraudulent deviation from course. Acts done through incompetence merely are not barratrous. (Scrut. 184.)

1005

Negligence clauses are construed strictly against the shipowner, and will not protect him from the consequences of his own personal negligence, such as the negligent appointment of a drunken or incompetent captain. (Scrut. 185.)

"Negligence."

1006

When the contract of affreightment cannot be performed without a violation of English law it is void, whether the parties knew of the illegality or not when it was entered into. (*Esposito v. Bowden*, 7 E. & B. 762.) But when a contract can be performed in two ways, one of which is legal and the other illegal, it will not be avoided unless there is an intention to perform it in the way known to be illegal. (Scrut. 8-9; *Waugh v. Morris*, L. R. 8 Q. B. 208.) An adventure which involves any breach of the revenue laws of another country will not be deemed illegal. (1 Sm. Merc. Law, 407.)

Illegality of contract of affreightment.

1007

A merchant who has taken a ship to freight or the consignee must pay the charges due on his commodities.

Charges payable by merchant or consignee.

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These are usually primage, average, demurrage, and freight. Primage is a small payment to the master for his trouble. Average denotes several petty charges, such as towage, beaconage, &c. Demurrage and freight have been already explained. (Abbott, 531; 1 Sm. Merc. Law, 368.) **1008**

Salvage.

Salvage is a compensation to be made by the shipowner or merchant for some special assistance by which the ship or its lading has been saved from some impending peril, or recovered after actual loss. (1 Sm. Merc. Law, 389-93; Scrut. 221-3.) **1009**

General
average.

General average is a contribution which the law requires to be made by the several persons interested in a ship, freight, and cargo, to indemnify a person suffering a damage, loss, or expense, which was voluntarily and necessarily incurred for the purpose of, and conduced to, the saving the ship and cargo or a part of the property. Sacrifices of cargo by jettison, i. e., throwing goods overboard to lighten a ship, damages to cargo by pouring water on it to extinguish fire, and expenses incurred in warehousing and reloading goods when a ship puts into a port of refuge to repair a general average sacrifice, such as cutting away a mast, give rise to a claim for general average contribution. **1010**

The practice is, to ascertain the proportion that the value of the property sacrificed bears to the entire value of the ship, cargo, and freight, and to make the property of each owner (including the property sacrificed) contribute to the common loss in that proportion. The adjustment of the average is usually made by brokers, and the amount is paid by the insurers of the different parties chargeable. (2 Ste. Com. 138; *The Werra*, 12 P. D. 52.) **1011**

Particular
average.

Particular average loss arises from some injury suf-

ferred, or expenditure incurred, for the sole benefit of the person to whom the property belongs, and in this case the damage or expense falls entirely upon the particular owner of the property. **1012**

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Bottomry (so called, because it is in the nature of a mortgage of the bottom or keel of a ship, a part for the whole) is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a loan for the use of the ship, the borrower undertakes to repay the loan, with interest, in the event of the ship terminating her voyage safely, and binds or hypothecates the ship, freight, or cargo, or all of them, for the performance of his contract. This agreement is usually in the form of a bond, called a bottomry bond, but sometimes in the shape of a deed poll, and is then called a bottomry bill. If the ship returns, the ship, as well as the owner personally, becomes answerable for the money lent; but if the ship is lost, the lender loses his money. (2 Ste. Com. 98; Abbott, 152.) **1013**

Bottomry and
respondentia.

Where the loan was not on the vessel, but on the cargo, it used to be called respondentia, because, in that case, only the borrower personally is bound to answer the contract. Such person is said to take up money at respondentia. (2 Ste. Com. 99.) **1014**

But the term respondentia is now seldom used; the term bottomry being employed, even where the cargo alone is the security. The terms bottomry and respondentia have been also incorrectly applied to contracts for the repayment of money borrowed on the mere hazard of the voyage. (2 Ste. Com. 99; Abbott, 153.) **1015**

The lender's principal being at hazard during the voyage, he was entitled to stipulate for any amount of interest whatever, even when the usury laws were in force. (Abbott, 152.) **1016**

Interest.

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Effect of
hypotheca-
tion.

Although a bottomry bond or bill purports to assign the ship, freight, or goods, the effect of it is not to give the creditor a property in that which is so assigned, but to give him a claim upon it, enforceable by legal process. (Abbott, 155.) **1017**

Order of pay-
ment of loans.

If securities of this kind are given at different periods of the voyage, and the value of the property is insufficient to discharge them all, the last in point of date is entitled to priority of payment, if the master was unable to obtain the necessary supplies on the personal credit of himself or his employers; because without the last loan, the former lenders might have entirely lost their security. (Abbott, 160.) **1018**

CHAPTER IX.

INSURERS AND INSURED.

I. *Insurance generally.*

INSURANCE is a contract by which a person, company, or society, in consideration of a gross sum or of a periodical payment, undertakes to pay a larger sum on the happening of a particular event. **1019**

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CHAP. IX.

Definition of
insurance.

The consideration is termed the premium or premiums; the party entering into the undertaking, the assurer or insurer; the party for whose benefit it is entered into, the assured or insured; the happening of the event, the risk; and the instrument containing the contract, the policy. The interest which it is necessary for a person to have before he can effect an available insurance on his own account and for his own benefit, is called an insurable interest; and the interest of the assured is said to be covered by the policy, when the amount payable under the policy would fully compensate him for any loss his interest may sustain. (See Sm. Merc. Law, 395; 2 Ste. Com. 131, 139; Bunyon, 1, 2, 14.) **1020**

Explanation
of the terms
in use.

The law requires the strictest good faith on the part of everyone who effects an insurance of any kind; so that the contract will be void if the insured has been guilty of fraud, or misrepresentation of any material circumstance, or concealment of any material fact which lies within his private knowledge, though no loss may have arisen therefrom. (Sm. Merc. Law, 396, 499, 505; 2 Ste. Com. 141-2.) **1021**

Necessity for
the strictest
good faith.

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Return of
premium.

*Dane v.
Mortgage
Insurance
Corporation.*

Where a policy is void ab initio, but the insured has not been guilty of fraud or breach of the law, the premium must be returned. (2 Ste. Com. 142.) **1022**

In a recent case, a sum deposited with an Australian bank was insured. The bank failed to pay; and a scheme of arrangement was sanctioned by the Colonial Court, in accordance with a Colonial statute, by which provision was made for claims on the bank, and creditors were bound to accept such provision in satisfaction of their claims. It was held the scheme of arrangement was no answer to the insurer's claim on the insurance company. (*Dane v. Mortgage Insurance Corporation*, (1894) 1 Q. B. 54.) **1023**

Ordinary
species of
insurance.

The most ordinary species of insurance are life insurance, fire insurance, and marine or maritime insurance. **1024**

II. *Life Insurance.*

Life insur-
ance defined.

Life insurance is a contract by which the insurer, in consideration of a gross sum or an annual payment, agrees to pay the person for whose benefit the insurance is effected, or his executors, administrators, or assigns, a certain sum of money or annuity, on the death of the person whose life is insured, whenever it happens, if the insurance is for the whole life, or in the event of the death happening within a certain period, if the insurance is only for that period. (Sm. Merc. Law, 491; Bunyon, 1, 5.) **1025**

On what lives
an insurance
may be
effected.

A person may effect an insurance upon his own life, or on the life of another in which he (the person insuring) has a pecuniary interest; but no insurance may be effected on a life in which the person for whose benefit or on whose account such insurance is made has no pecuniary interest, or by way of gaming or wager-

ing; and such person's name must be inserted in the policy; and no greater sum may be received from the insurer or insurers than the value of the interest of the insured in such life. But though the interest afterwards terminates the policy may be kept up. (Ad. Con. 1084-5; 2 Ste. Com. 138-41; Bunyon, 11, 14-21; 14 Geo. III. c. 48, ss. 1-3; *Hebdon v. West*, 3 B. & S. 579; *Evans v. Bignold*, L. R. 4 Q. B. 622; *Dalby v. India and London Life Assurance Co.*, 15 C. B. 365.) **1026**

A wife has an insurable interest in the life of her husband; but a husband, parent or child has not such an interest in the life of his wife, child, or parent, unless he has an interest in property dependent on the life of his wife, child, or parent. (Bunyon, 14-16; 2 Ste. Com. 140.) **1027**

A husband may effect a policy of assurance on his own life, and expressed to be for the benefit of his wife and children or any of them; and a wife may insure her life for the benefit of her husband and children or any of them; and such policies create trusts in favour of the objects named (45 & 46 Vict. c. 75, s. 11); who take as joint tenants. (*Seyton v. Satterthwaite*, 34 Ch. D. 511; *Cleaver v. Mutual Reserve Fund*, (1892) 1 Q. B. 147.) **1028**

A trustee may insure in respect of his trust, and for the benefit of his trust estate. And a creditor may insure the life of his debtor to the extent of the debt. (Ad. Con. 1084; 2 Ste. Com. 141; Bunyon, 20-1.) **1029**

If for greater security anyone thinks fit to insure with different insurers by different contracts, and to pay the premium on each policy, he is at liberty to do so; but he can only recover in the whole the amount of

Insurance
with different
insurers.

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his insurable interest; and if he has received the whole amount from one insurer, he is precluded from recovering any more from the others. (*Hebdon v. West*, 3 B. & S. 579.) **1030**

Declaration.

It is usual for the person whose life is insured to subscribe a declaration concerning his age, health, and other circumstances, which is generally, either expressly or by reference, embodied in the policy, and the correctness of which is a condition precedent to the responsibility of the insurers. But a warranty that the insured is in good health, means in reasonable good health, not that he is perfectly free from illness. (*Bunyon*, 39, 60-1; *Ad. Con.* 1086.) **1031**

Fraud, misrepresentation, or concealment.

Fraud, misrepresentation, or non-communication of material circumstances by the insured or his agent when the policy is effected, renders it void. (*Ad. Con.* 1086-7; 2 *Ste. Com.* 141; see *Perrins v. Marine, &c.*, *Insurance Society*, 2 *Ell. & Ell.* 317; *Blackburn v. Vigors*, 12 *App. Cas.* 531; *Blackburn v. Haslam*, 21 *Q. B. D.* 144.) **1032**

Proviso.

A proviso is ordinarily inserted, declaring the policy to be void, in case the insured (where a man insures his own life) should commit suicide or be executed for any crime, or if the age of the insured exceeds a specified number of years, or if he has disease tending to shorten life, or if the declaration contains any untrue account. But this is generally expressed to be subject to the exception, that the policy shall remain in force so far as it regards any bonâ fide interest acquired in it by a third person. Apart from contract, the policy cannot be recovered if the insured commit suicide, unless he be insane at the time. (*Ad. Con.* 1088; *Bunyon*, 94-5.) **1033**

Default in

In case of non-payment of the premium in the stipu-

lated manner, the policy will be void, and will not be revived by a subsequent receipt of the premium, though the company may not have been at all damnified. Nor will it be an available excuse that the assured received no notice reminding him of the day for paying the premium; for such a renewal notice, as it is termed, though customary, is not required by law. **1034**

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payment of
premium.

By the conditions, a certain number of days after the day named for payment, called days of grace, are frequently allowed for the payment; but these cannot be depended upon if the life should drop after that day and before payment, unless it is expressly so provided in the policy. (Ad. Con. 1089; Bunyon, 86.) **1035**

Days of grace.

A policy of insurance, being a chose in action, was not formerly assignable at Law, so as to enable the assignee to sue at Law in his own name; but the assignment was valid in Equity, and enabled the assignee to sue at Law in the name of the assignor, in whom the legal interest still remained after the assignment. Now, however, the assignee may sue in his own name. (Ad. Con. 1090; 30 & 31 Vict. c. 144, s. 1. And see *supra*, par. 592.) **1036**

Assignment
of policy.

A policy of life insurance is not a contract of indemnity; and hence a person may claim the benefit of the policy, even though he may have sustained no loss by the occurrence of the event upon which the money becomes payable. So that if a creditor insures the life of his debtor to the extent of his debt, the creditor may recover the money insured, though the executors of the debtor may have paid the debt. (Ad. Con. 1092-3.) **1037**

A life policy
not a contract
of indemnity.

III. *Fire Insurance.*

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TIT. II.
CHAP. IX.
Fire insurance defined.

An insurance against fire is one by which the insurer, in consideration of a payment in gross or at stated intervals, agrees to indemnify the assured for a certain time against damage to his property by fire. **1038**

Interest of the insured.

The insured must have some kind of pecuniary interest in the property or of accountability for its safety; and he can only recover to the extent of that interest. And the assurance is not assignable, without the insurer's consent, to a purchaser of the property. (Ad. Con. 1075; 2 Ste. Com. 139; 14 Geo. III. c. 48, s. 1.) **1039**

A warehouseman, wharfinger, common carrier, or bailer of goods may keep up a floating policy for the insurance of the goods of his customers; but the money will belong to them, and may be recovered from him, when received by him. (Ad. Con. 1076, 1082.) **1040**

Different kinds of risks.

Risks are usually divided into three: 1st, common insurance; 2nd, hazardous; 3rd, doubly hazardous. But there are also extraordinary risks, which are the subject of special agreement. **1041**

Negligence.

A loss by mere negligence, without fraud, is covered by the policy. (Ad. Con. 1079.) **1042**

Increase of the risk by altering the property.

If the insured alters the premises in such a way as to increase the risk, he thereby forfeits the policy. (Ad. Con. 1077.) **1043**

Unusual risk.

If the insured does not disclose to the insurer any unusual risk existing at the time of the policy, this will deprive the insured of all right of action on the policy. (Ad. Con. 1078.) **1044**

Days of grace.

A mere proviso or condition giving a certain number of days of grace for the payment of the premium will not protect the insured, in case a loss by fire happens

within those days, but before the premium is paid. There should be an express stipulation that the insurance shall continue, and the property be covered by the policy, until the expiration of the days of grace. (Ad. Con. 1080.) **1045**

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To deter persons from setting their own premises on fire in order to obtain the sum for which they are insured, the insurance office may, at the request of any person interested in a building burnt down or damaged, or upon any suspicion of fraud, cause the insurance money to be expended in repairs, unless the party insured, within sixty days after adjustment of the claim, gives security that the money shall be expended, or the money at that time is disposed of, to the satisfaction of all parties. (Ad. Con. 1083; 14 Geo. III. c. 78.) **1046**

Power of
obliging the
insurance
money to be
laid out in
repairs.

A fire policy is a contract of indemnity; and hence, if a person receives, under an insurance, a full compensation for his loss by fire, and afterwards recovers damages in an action against the person who caused the mischief, he is bound to hand over the damages to the insurer, who, in such case, is the party really damnified. And on the other hand, if he proceeds in the first instance against the wrong-doer, and recovers full compensation from him, he cannot then sue on the policy. If the insurer pays the compensation, he may sue the wrong-doer in the name of the insured. (Ad. Con. 1082-3.) **1047**

Recovery of
compensation
from a wrong-
doer, and also
from an
insurer.

If a person has insured property and contracted to sell it, and a fire occurs, the purchaser cannot (unless the policy has been assigned to him) claim the benefit of the insurance; nor, as it is a contract of indemnity, can the vendor recover from the insurance company. (*Rayner v. Preston*, 18 Ch. D.) **1048**

IV. *Marine Insurance.*

PART II.
TIT. II.
CHAP. IX.

Marine insur-
ance defined.

Marine insurance is a contract by which one party, for a stipulated sum, agrees to indemnify another against loss of a ship, or the goods, or the freight, or the profits expected from the cargo, or of all or any of them, during a certain voyage or a certain period.

1049

Underwriters.

Such insurances are usually undertaken by several persons, who are called underwriters, from their subscribing the policy, and each engaging thereby, on his own separate account, to indemnify to the extent of a certain sum set opposite his name, as subscribed or underwritten at the foot of the policy. (1 Arnould, 16, 147; 2 Ste. Com. 132; Sm. Merc. Law, 395-6.)

1050

A policy of marine insurance is not always a contract of mere indemnity. (*Aitchison v. Lohre*, 4 App. Cas. 755; *Marine Insurance Co. v. China Trans-Pacific Co.*, 11 App. Cas. 573.) **1051**

The insurer must have an insurable interest at the time of the loss, though not necessarily at the time of effecting the policy; but in order to have an insurable interest, it is sufficient to have a right of such a nature that the insurer may be benefited by the preservation of the thing insured, and prejudiced by its destruction. (1 Arnould, 55-60; 1 Sm. Merc. Law, 406; 19 Geo. II. c. 37, s. 4.) **1052**

Overvaluing
an interest.

If the insured fraudulently overvalues his interest he cannot recover even for the value proved to be on board. (1 Sm. Merc. Law, 411; 1 Arnould, 302, 331.)

1053

Form of
policy.

The form of the policy in use was introduced into England by the Lombards, and is very inaccurate and

ungrammatical in its language. It is usually printed with blanks for the insertion of necessary particulars, as the intention of the parties happens to require.

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1054

Insurance may be either for a particular voyage, or Time policy. it may be a time policy. A time policy is a policy by which a ship is insured for a certain period of time, instead of for a certain voyage. (1 Arnould, 230.) Such an insurance is effected in consequence of the ship being intended to be employed in adventures, which, from their nature, it would be inconvenient or even impossible to designate by local termini. 1055

Policies generally contain warranties, i. e., stipulations, on the literal truth or fulfilment of which the validity of the entire contract depends. 1056

Warranties are either express or implied. An express Express. warranty is one that appears in the policy, or in some writing which is by reference incorporated with it. An Implied. implied warranty is one which is deemed to exist in every policy unless expressly negatived. 1057

The things usually warranted are: 1, the time of sailing; 2, the safety of the ship at a certain time; 3, departure with convoy, if in time of war; 4, neutrality of the property, if in time of war; 5, freedom from seizure in port. 1058

The literal truth or fulfilment is so indispensably necessary as a condition precedent to the right of the assured to recover on the policy, that all questions as to the materiality or immateriality of the thing warranted to the risk, or of the substantial truth or fulfilment, and all excuses for want of truth or compliance, are excluded. (2 Arnould, 599, 621; Sm. Merc. Law, 445.)

1059

The implied warranties are: 1. That the ship shall Implied.

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pursue the proper course of the voyage without deviation or delay; 2. Seaworthiness; 3. Reasonable care to guard against the risks. **1060**

Deviation.

A deviation from the proper course, unless justified by necessity, discharges the underwriter, not from the commencement, but from the time of deviation; so that it does not exempt him from loss incurred before the deviation, but he is free from responsibility subsequent to the deviation, though the loss were not occasioned by the deviation, and though the ship resumed her proper course before it happened. (1 Sm. Merc. Law, 450-1; 1 Arnould, 253-5.) **1061**

Seaworthi-
ness.

There is no implied warranty that the ship shall continue seaworthy in the course of the voyage. (2 Arnould, 652.) **1062**

There may be different stages of seaworthiness in cases where there are different stages of navigation. But the vessel must be seaworthy for each of the stages of navigation when she enters upon each stage: the rendering her seaworthy after the commencement of a given stage and before any loss will not be sufficient. (*Quebec Marine Insurance Co. v. Commercial Bank of Canada*, L. R. 3 P. C. 234.) The warranty is to be construed relatively to the character and capacity of the vessel itself. (*Burges v. Wickham*, 3 B. & S. 669.)

1063

Losses.

Loss is either total or partial, called also average loss.

Total.

A total loss is one on account of which the insured is entitled to recover the whole amount insured. Total

Absolute total
loss.

losses are either absolute or constructive. An absolute (otherwise called an actual) total loss is one which takes place when the subject insured is wholly destroyed or cannot be recovered, at least without such an expense as to render the attempt to recover it worthless. A con-

Constructive
total loss.

structive total loss is one which takes place when the subject insured is not wholly destroyed, but its destruction is imminent, or its recovery exceedingly doubtful.

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1064

In the case of an absolute total loss, the underwriter is liable for the whole amount of his subscription absolutely. But in the case of a constructive total loss, the underwriter is only liable for the whole amount of his subscription, in case the insured, within a reasonable time, gives notice of abandonment. **1065**

Liability of
underwriters.

Abandonment is a relinquishment, to the insurer by the insured, of the subject of insurance, or whatever part thereof may be saved, where the insured calls upon the insurer to settle with him for a total loss, in consequence of the greatness of the damage, the imminent danger of destruction, or the improbability of recovery. (1 Sm. Merc. Law 461-2; 2 Arnould 951-2; *Stringer v. English, &c., Insurance Co.*, L. R. 4 Q. B. 676; 5 Q. B. (Ex. Ch.) 599; *Cossmann v. West*, 13 App. Cas. 160.)

Abandon-
ment.

1066

By 31 & 32 Vict. c. 86 a policy of marine insurance can be assigned, and the assignee shall be entitled to sue thereon in his own name. **1067**

Actions by
assignees of
policies.

CHAPTER X.

INNKEEPERS AND GUESTS.

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Definition of
an innkeeper.

A common innkeeper is one who professes to supply lodgings and provisions for the night, for all comers who are ready to pay for them; by whatsoever name his establishment may be designated. But a person who professes to let private lodgings only, or to supply provisions only, is not an innkeeper. (Ad. Con. 680; 2 Ste. Com. 90-1.) **1068**

Duty of an
innkeeper.

A common innkeeper is bound to afford such accommodation as he possesses for all persons, and for the horses and goods of all persons, who are ready to pay the customary charges, and are not intoxicated, or guilty of impropriety of conduct, or suffering under a contagious or infectious disease; and, if he does not, he is liable to an action for damages, and also to an indictment. But he is not bound to receive the goods of a person who merely desires to use the inn as a place of deposit. (Ad. Con. 680; 2 Ste. Com. 91; Chit. Con. 402.) **1069**

If a traveller forms an intention of staying in the inn and has no intention of going on to any other place, he ceases to be a traveller, and the innkeeper is entitled to terminate the relation of host and guest by reasonable notice. The question whether a traveller staying in a common inn has ceased to be a traveller is a question of fact, in determining which the length of his stay in point of time must be taken into consideration, but is

not of itself conclusive. (*Lamond v. Richard*, (1897) 1 Q. B. 541.) **1070**

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An innkeeper is responsible for the goods deposited by any person at his inn as a guest, when they are damaged, stolen, or lost. To charge the innkeeper on the custom or common law of the realm for loss of the goods of his guest it is necessary (1) that the inn be a common inn; (2) that the guest be a traveller or passenger; (3) the goods and chattels must be in the inn; (4) there must be a defect on the part of the innkeeper (but there is a defect whenever there is a loss not arising from the guest's negligence, act of God, or the enemies of the Sovereign); (5) the article lost must be a moveable. (*Calye's Case*, 1 Sm. L. C. 115: Ad. Con. 681-4; 2 Ste. Com. 91; Broom, Com. 926; Jones Bail, 94; 1 Rose. 627; Chit. Con. 399-401; *Morgan v. Ravey*, 6 H. & N. 265; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515.) **1071**

Liability of
an innkeeper
by the com-
mon law.

If a guest negligently leaves money or valuables in rooms of common resort, the innkeeper is not responsible for their safety. (Ad. Con. 682; 1 Rose. 627.) **1072**

If an innkeeper takes charge of goods for a person who is not lodging at the inn at all, or is lodging there as a lodger, and not as a traveller and guest, the innkeeper is only responsible in the first case as a bailee, and in the second case as a lodging-house keeper. (Ad. Con. 684-5; *Strauss v. County Hotel, &c., Co.*, 12 Q. B. D. 27.) **1073**

And by the Innkeepers Act, 1863 (26 & 27 Vict. c. 41), "No innkeeper shall, after the passing of this Act, be liable to make good to any guest of such innkeeper any loss of or injury to goods or property brought to his inn, not being a horse or other live animal, or any gear appertaining thereto, or any car-

Statutory
limitation of
his liability.

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riage, to a greater amount than the sum of 30*l.*, except in the following cases: (that is to say) (1) Where such goods or property shall have been stolen, lost, or injured, through the wilful (*a*) act, default or neglect of such innkeeper or any servant in his employ (*b*); (2) Where such goods or property shall have been deposited expressly for safe custody with such innkeeper: provided always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same." (s. 1).

1074

"If any innkeeper shall refuse to receive for safe custody, as before mentioned, any goods or property of his guest, or if any such guest shall, through any default of such innkeeper, be unable to deposit such goods or property as aforesaid, such innkeeper shall not be entitled to the benefit of this Act in respect of such goods or property." (s. 2). **1075**

Notice of law
to be con-
spicuously
exhibited.

"Every innkeeper shall cause at least one copy of the first section of this Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance to his inn, and he shall be entitled to the benefit of this Act in respect of such goods or property only as shall be brought to his inn while such copy shall be so exhibited." (s. 3). **1076**

A restaurant keeper may be liable as a bailee for goods of his guests. (*Ultzen v. Nicolls*, (1894) 1 Q. B. 92). **1077**

Lien.

If an innkeeper receives an article, though it be not

(*a*) *Squire v. Wheeler*, 16 L. T. (N. S.) 93.

(*b*) *Spice v. Bacon*, 2 Ex. D. 463.

ordinary travellers' luggage, as belonging to his guest he has a lien upon it for his charges for board and lodging supplied to the guest; and he does not destroy his lien by taking security. But he cannot detain the person of his guest. His lien is co-extensive with his liability. (*Angus v. McLachlan*, 23 Ch. D. 380, 336; *Gordon v. Silber*, 25 Q. B. D. 491.) **1078**

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A landlord has a lien upon goods, sent to and in the hands of a commercial traveller, for the board and lodging of the latter, although to the landlord's knowledge the goods belonged to the person employing the traveller. (*Robins v. Gray*, (1895) 2 Q. B. 501.)

1079

By the stat. 41 & 42 Vict. c. 38 (8th August, 1878), it is enacted that "the landlord, proprietor, keeper, or manager of any hotel, inn, or licensed public-house shall, if a guest become indebted to him for any board or lodging or for the keep and expenses of any horse or other animals, and shall deposit or leave any personal effects with him, or in the inn or premises belonging thereto, for the space of six weeks without the debt having been paid, have, in addition to his ordinary lien, the right to sell such goods by public auction. Any surplus after paying the debt and expenses of such sale is to be paid on demand to the person who deposited or left the goods." **1080**

Landlord, &c.,
may dispose
of goods left
with him after
six weeks.

At least one month before any such sale the landlord shall cause to be inserted in one London newspaper and one country newspaper circulating in the district an advertisement containing notice of such intended sale, and giving shortly a description of the goods and chattels intended to be sold, together with the name of the owner or person who deposited or left the same where known. **1081**

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Rights and obligations of lodging-house keepers and lodgers.

There is an implied warranty on the part of persons who let furnished houses or lodgings, that they are reasonably fit for occupation; and, unless otherwise agreed, such persons are under an obligation to supply and permit the use of such things as are necessary for the occupation of such houses or lodgings. (Ad. Con. 677; Woodf. 184, 238.) **1082**

Wear and tear.

The occupier of a furnished house or lodgings is not responsible for deterioration by ordinary wear and tear, in the reasonable use of the property of the landlord or lodging-house keeper. (Ad. Con. 678.) **1083**

Responsibility of a lodging-house keeper.

A lodging-house keeper is not liable as an innkeeper, but he is bound to take that degree of care for the protection of his house and of the property of his lodgers in it, and to use that degree of caution in the choice of his servants which a prudent housekeeper would ordinarily take and use. But having done this, he is not responsible for the loss of the property of his lodgers, even by the theft of his own servants, unless it has been delivered over to him for safe custody. (Ad. Con. 678, 682; Broom, Com. 929-30; Woodf. 238.) **1084**

Duration of tenancy in the case of lodgings.

The duration of the tenancy in the case of lodgings ordinarily corresponds with the time for the payment of rent; so that, for example, if the rent is payable weekly, the presumption is that the hiring is for a week. (Ad. Con. 678.) **1085**

Notice to quit lodgings.

If the tenancy is for a definite period, as for a month or a week, no notice to quit is necessary. But if the tenancy is from month to month, a month's notice is necessary; if from week to week, a week's notice is in general necessary by custom or usage. Where no such custom or usage exists, a reasonable notice is sufficient. And the notice must expire at the

end of the current term of hiring. Where the requisite notice is not given, the rent for the period for which notice ought to have been given must be paid.

(See Ad. Con. 679; Woodf. 363.) **1086**

Lodgers are in general subject to the same rules as other tenants. (Woodf. 237.) **1087**

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General law
as to lodgers.

CHAPTER XI.

PARTIES TO BILLS OF EXCHANGE, PROMISSORY NOTES,
CHEQUES, AND OTHER NEGOTIABLE INSTRUMENTS.

Negotiable Instruments.

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THINGS IN ACTION (i.e., rights to things which are not in possession, but can only be recovered, if withheld, by an action) were not assignable at Law before the passing of the Supreme Court of Judicature Act, 1873, and can now be so assigned only, in accordance with the provisions of that statute *et*, when express notice has been given in writing to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such chose in action. Moreover, the assignee takes subject to all equities or defences available against the assignor. But a negotiable instrument is an exception to this rule, for it can be assigned, so as to enable the assignee to sue upon it in his own name, without notice, and the assignee, if he is a bona fide holder for value, has a good title, notwithstanding any defect of title in the party from whom he took it. (Byles, 3.) **1088**

Law
merchant.

Negotiable instruments owe their origin to the law merchant. The law merchant was in earlier times not a part of the common law as it is now, but a concurrent and co-existent law, administered in its own Courts in

See the Supreme Court of Judicature Act, 1873, s. 25, clause (6), *supra*, par. 592.

the Staple. As the Courts of the Staple decayed, those parts of the law merchant which differed from the common law, either fell into disuse or were adopted into the common law as the custom of merchants. (Blackburn, 317.) Bills of exchange were the earliest form of negotiable instruments recognized in England. In the time of Chief Justice Holt, a controversy arose between the Courts and the merchants as to whether the customary incidents of negotiability were to be recognized in the case of promissory notes. The dispute was settled by 3 & 4 Anne, c. 9, which confirmed the negotiability of notes. In the case of *Crouch v. Credit Foncier of England* (L. R. 8 Q. B. 374), it was held that documents, other than bills or notes, could not be endowed by custom with the incidents of negotiability. But the efficacy of custom was again upheld later in *Goodwin v. Robarts* (L. R. 10 Ex. 337; 1 App. Cas. 476), when it was determined that foreign scrip might be rendered negotiable by custom, so as to pass with a good title and free from all equities to a bonâ fide purchaser. The Court declared that the novelty of a general usage is no objection to its being incorporated into the law merchant. (Chalm. B. Introd.) **1089**

Bills of exchange, promissory notes, and cheques are now governed by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), which codifies the law on these instruments. **1090**

Instruments which are negotiable in one state may be deprived of their negotiable character. Thus, a bill, or a note, when indorsed in blank, is negotiable; yet by a restricted indorsement the holder may cause its negotiability to cease. (Byles, 180; Chalm. B. 112.)

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Use and effect
of negotiable
instruments.

Negotiable instruments are employed: (1) To save the necessity of transmitting money abroad. Thus, if A. owes B. 50*l.*, and B. owes C. 50*l.*, and A. and C. are resident abroad in the same place, but B. is resident in England, B. might draw a bill on A. payable in favour of C. (2) To obtain immediate payment of a debt payable at a future time. Thus, if A. owes B. 50*l.*, but the debt is not payable until three months have elapsed, B. might draw a bill on A. for 50*l.* at three months, payable to himself, and then discount such bill. (3) To raise money on the joint credit of the drawer of the bill and the acceptor thereof. This is called an accommodation bill. (4) As a substitute for cash. They form, in fact, a paper currency. (See below, pars. 1093-5, for explanation of the terms, "bill," "drawer," "acceptor," &c.) **1092**

Bills of Exchange, Promissory Notes, and Cheques.

Bill of ex-
change
defined.

A bill of exchange (frequently termed a draft) is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer. An order to pay out of a particular fund is not unconditional. The person making this order is the drawer; the person to whom it is addressed (who must be indicated with reasonable certainty) is the drawee, and, if he accepts it, the acceptor; and the person in whose favour it is made is the payee. Sometimes the same person is both drawer and payee. (Broom, Com. 449; Byles, 1; 45 & 46 Vict. c. 61, ss. 3, 6.) **1093**

"Drawer,"
"drawee,"
"acceptor,"
"payee."

Indorsee.

If the bill is payable to, or to the order of, a specified person, such person must indorse his name on the back

of the bill to transfer his right thereto. He is then said to be an indorser. If he, in turn, make the bill payable to another, the latter is called an indorsee.

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1094

An accommodation bill is a bill to which a person has put his name as a drawer, acceptor, or indorser, without receiving value therefor, merely to accommodate some other party, by enabling him to get it discounted. And it sometimes happens that two persons agree to mutually draw upon one another without any value passing; and the drawer in each case gets his banker or some other person, relying on the credit of the drawer and acceptor, to discount the bill, so as to raise money, for purposes of speculation or other purposes; the discounteer not knowing but that the full value passed, and the acceptor hoping to have funds to pay the bill at maturity. In these cases there is an implied contract by the party accommodated to pay or enable the accommodating party to pay the bill at maturity, and to indemnify the accommodating party in case he is obliged to pay it. (Broom, Com. 454; Byles, 149-50.)

Accommodation bill.

1095

It is no defence to an action by an indorsee for value against an acceptor that the acceptor received no value, even though the indorsee knew such to be the case when he took the bill, but where an indorsee of a bill is aware that it is only an accommodation bill, and has paid only part of the amount for which the bill was drawn, he can only recover what he paid. (Byles, 149.)

1096

The payee or indorsee of a bill who is in possession, or the bearer, is the holder. The person in possession of a bill payable to bearer is the bearer. (45 & 46 Vict. c. 61, s. 2.)

1097

Holder of a bill.
Bearer.

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Cheque
defined.

A cheque is a bill of exchange drawn on a banker payable on demand. (45 & 46 Vict. c. 61, s. 73.) It is an order or request, made in writing, or partly in print and partly in writing, to a banker by his customer, to pay a certain sum to a person or bearer or order, on demand. **1098**

Bank-note
defined.

A bank-note is a promissory note made by a banker, payable to a bearer on demand, and circulated and generally treated in law as money (Byles, 10; Broom, Com. 492; Chalm. B. 263.) **1099**

Difference
between a
cheque and a
bill of
exchange.

A cheque is in general subject to the same rules as a bill of exchange. But it does not require acceptance, and, in the ordinary course, it is never accepted; and the drawer of a cheque is the principal debtor, like the maker of a note, and not a surety for the drawee, as in the case of a bill. And a cheque is not usually indorsed, unless made payable to order. It is not intended for circulation, but is given for immediate payment, and it is not entitled to days of grace. But the drawer is not discharged by the holder's neglect to present it in due time, unless the banker has failed during the interval. (Byles, 16-32; Broom, Com. 478; Chalm. B. 245-9.) **1100.**

Promissory
note defined.

A promissory note (or note of hand) is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person or to bearer. (45 & 46 Vict. c. 61, s. 83.) The promisor is called the maker; and the promisee, or person to whom the promise is made, is called the payee. (Byles, 6; Broom, Com. 483-4.) **1101**

"Maturity."

"Taken up."

A bill is said to be "at maturity" when it becomes due; and to be "taken up" when it is paid; and

when a person is said to “retire” a bill it is generally meant that he pays it before maturity, but sometimes the term is applied to a payment by the acceptor at maturity. (Byles, 93, 296.) **1102**

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“Retiring a bill.”

Those only can be parties to a bill or note who would be capable of entering into any other contract. A married woman can now, under the statute 45 & 46 Vict. c. 75, bind herself to the extent of her separate property, by making, drawing, accepting, or indorsing negotiable instruments. **1103**

Parties to a bill or note^(a).

A bill or note may be written or indorsed in pencil. (Byles, 85.) **1104**

Requisites in a bill or note.

It is not essential that a bill or note be in any particular form of words. But there is an established form, to which it is very desirable to adhere, in order to prevent questions from arising. In a bill there must be an order or request, and in a note a promise to pay. A mere supplication in a bill, or a mere acknowledgment in a note, will not suffice. The instrument must be simply for the actual payment of money in specie alone, and not “cash or bank-notes,” nor for the payment of money or the doing or not doing anything else, in the alternative, or both for the payment of money and the doing or not doing anything else. The money payable must be a definite amount. It must be payable absolutely and not conditionally or contingently, as to amount, event, fund, or person. And if a time is specified, the money must be payable at a time which is sure to arrive (as, for instance, on the death of the drawer’s father), though it be very distant or uncertain when it will arrive. If there is any word in a note which renders the ultimate liability

(a) As to infants, see *supra*, pars. 545-56.

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to pay uncertain it will not be negotiable, but will be a mere agreement. (Byles, 103-8; Broom, Com. 449-51; Chalm. B. 9-13.) **1105**

Form of a bill.

The following is the form of an inland bill:—

London, January 1, 1867.

£100 0s. 0d.

On demand, *or* at sight, *or* days *or*
months after sight, *or* days *or* months
after date, *or* at [some other period] pay to
C. D. or order [*or* to C. D. or bearer, *or* to C. D.
or to the order of C. D., *or* to bearer, *or* to
my order] One hundred pounds [for value re-
ceived].

JOHN WOOD.

To Mr. Thos. Jones, Merchant, Liverpool. **1106**

Form of a note.

The following is the form of a promissory note:—

London, January 1, 1867.

£100 0s. 0d.

On demand, *or* at sight, *or* days *or*
months after sight, *or* days *or* months
after date, *or* at [some other period] I promise
to pay to C. D. or order [*or* to C. D. or bearer,
or to C. D., *or* to the order of C. D., *or* to
bearer] One hundred pounds [for value received].

JOHN WOOD.

(Broom, Com. 487; Byles, 85-100; Chalm. B. 8-59.)

1107

A promissory note for less than 5*l.* payable to bearer on demand is, it seems, void in England. (Chalm. B. 263.) **1107a**

Place and amount in the case of a bill or note.

It is not essential to state the place of making a bill or note, or to superscribe or subscribe, in figures, the sum payable. (Byles, 86.) **1108**

A date is not essential to a bill or note. If omitted, the instrument will be considered as dated at the time it was made. (Byles, 86.) **1109**

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Date.

A bill or note may be made payable at any period or on any event, however distant, if it must arrive or happen. If no time of payment is expressed, the amount will be payable on demand. (Byles, 88, 283.) **1110**

Time of pay-
ment.

The words "after sight," in a bill, mean after acceptance, or protest or noting for non-acceptance; and, in a note, "after presentment for sight." (Byles, 88.) **1111**

"After
sight."

The words "on demand," do not import that it is necessary to make a demand before the bill or note will become payable, but merely denote that the debt is due and payable immediately, so that an action will be a sufficient demand. And hence, if a bill or note is payable on demand, the Statute of Limitations runs from the date of the instrument, without waiting for a demand. (Byles, 14, 88, 356.) **1112**

"On de-
mand."

In the case of a bill or note, a month means a calendar month. (Byles, 89, 277.) **1113**

A valuable consideration is necessary to support a bill or promissory note. Money advanced and received as a gift cannot form a consideration for a note signed some time afterwards. A promissory note, as between the original parties to it, is no more than an express promise to pay a sum of money; and an express promise for an executed gratuitous consideration is a nudum pactum; and from a nudum pactum no action arises. (*Hill v. Wilson*, L. R. 8 Ch. Ap. 888, 894, 901.) **1114**

Considera-
tion.

A pre-existing debt or liability is a sufficient consideration to support a bill or note received bonâ fide and without notice of any infirmity of title on the part

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of the debtor. And the same law applies to a cheque. (*Currie v. Misa*, L. R. 10 Ex. (Ex. Ch.) 153; 1 App. Cas. 554; 45 & 46 Vict. c. 61, s. 27 (b).) **1115**

A bill or note is *primâ facie* presumed to have been given for a sufficient consideration, unless, in an action between the immediate parties to it or their representatives (as between the drawer and acceptor of a bill, or a payee and drawer of a bill, or the payee and maker of a note, or between an indorsee and *his* indorser), the defendant sets up a *primâ facie* case, as a defence in toto, that he received no consideration, or as a defence pro tanto, that he received no sufficient consideration, or unless the defendant makes out a *primâ facie* case of loss, theft, fraud, forgery, or other illegality. But the want of consideration as between the immediate parties to it will not constitute a defence in an action by a holder who is not one of the immediate parties, if he or some intermediate holder between him and the defendant took the bill or note *bonâ fide* and paid a valuable consideration for it; as where the action is brought by the payee against the acceptor, or by an indorsee against the acceptor, or by an indorsee against a remote indorser. (Byles, 137-165; Broom, Com. 448, 498-500; Chalm. B. 80-101.) **1116**

Felony,
fraud, for-
gery, or
illegality.

Felony, fraud, forgery, or illegality, vitiates a bill or note in the hands of the immediate parties, and also in the hands of third persons who have not given value for it, or have taken the instrument after it was due, or have taken it with notice from a person who is not an innocent indorsee for value, but not in the hands of a holder in due course. (Byles, 152-65; 1 Rosc. 387-9; Chalm. B. 99-101.) **1117**

Holder in due
course.

A holder in due course is one who has taken a bill:
1. Complete and regular on the face of it. 2. Before it

was overdue. 3. Without notice that it has been previously dishonoured, if such is the fact. 4. For value. 5. In good faith and without notice at the time the bill was negotiated to him of any defect in title of the person who negotiated it. In particular the title of a person who negotiates a bill is defective when he obtained the bill, or the acceptance thereof, by fraud, duress, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. (45 & 46 Vict. c. 61, s. 29.) **1118**

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A bill payable otherwise than on demand is overdue after the expiration of the last day of grace. (Chalm. B. 118.) A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact. (45 & 46 Vict. c. 61, s. 36, sub-s. 3.)

When bill is
overdue.

1119

“Notice” means actual, though not formal, notice; Notice. that is to say, either knowledge of the facts, or a suspicion of something wrong, combined with a wilful disregard of the means of knowledge. (Chalm. B. 90; *Raphael v. Bank of England*, 17 C. B. 174.) **1120**

Value may be, as has been said, any consideration sufficient to support a simple contract, or an antecedent debt or liability. **1121**

A thing is deemed to be done in good faith when it is in fact done honestly, whether it is done negligently or not. (45 & 46 Vict. c. 61, s. 90.) **1122**

Good faith.

As to the meaning of “good faith” and “notice,” reference may be made to two recent cases, in which, however, not bills but other negotiable instruments were concerned. In *Sheffield v. London Joint Stock Bank* (13 App. Cas. 333), the facts were as follows: A money

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dealer made an advance on certain negotiable bonds and other securities belonging to the plaintiff. The money dealer deposited them with the defendant bank to secure a running account, and then became bankrupt. The bank claimed to retain the securities of the plaintiff against the general balance due from the money dealer. It was held the bank could not do so, for they had notice that the securities were not the money dealer's property from their knowledge as to the nature of his business. But in *London Joint Stock Bank v. Simmons* ((1892) A. C. 201), the facts shown were that the plaintiff deposited with his stockbroker for safe custody certain Cedula bonds, which were payable to bearer. The broker wrongfully sold the plaintiff's bonds, but purchased others of the same kind, and entered them in his books in the plaintiff's name. Afterwards he pledged these new bonds with other securities with the London Joint Stock Bank to secure an advance to himself. It was held that the bank, being a pledgee for value and in good faith of negotiable instruments, could retain the bonds against the advance. In this case the bank had no reason to suppose the pledgor was acting without authority. (See also *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120.) **1123**

Rights of
bonâ fide
holder for
value or
"holder in
due course."

A holder in due course will not be affected by intermediate fraud or infirmity of title, nor bound to inquire whether the bill has been properly transferred or not, if he had no knowledge of or reason to suspect fraud or infirmity of title at the time he advanced his money on the security of the bill. **1124**

When a bonâ
fide holder
cannot
recover.

There are, however, certain cases in which even a holder in due course cannot recover against a person who has signed the bill. 1. When the bill is incomplete, and was not delivered by the person who signed. Thus, in

the case of *Barendale v. Bennett* (3 Q. B. D. 525), the facts shown were that defendant put a blank acceptance in his desk, and this was stolen and then filled up as a bill. It was held that even a bonâ fide holder in due course could not recover from the defendant, for he never delivered the inchoate instrument for the purpose of conversion into a bill. But when A. drew a cheque payable to bearer, intending to pay it to X., and it was stolen from his desk and passed into the hands of a bonâ fide holder for value without notice, it was held that the latter had a good title. (*Ingham v. Primrose*, 7 C. B. (N. S.) 82.) 2. When a person is induced by fraud to sign a bill or note under the belief that he is signing a wholly different instrument, his signature is null and void, provided that in so signing he acted without negligence. Thus, in *Foster v. Mackinnon* (L. R. 4 C. P. 704), it was held that an old man who indorsed a bill (the face of which he did not look at) under the false representation that it was a guarantee, was not liable to a bonâ fide holder. 3. When the person signing is an infant, or corporation having no capacity or power to incur liability on a bill. (45 & 46 Vict. c. 61, s. 22.) 4. When the bill is given for a consideration, which statute expressly declares shall make it void, it is, as against the party who gave it, void in the hands of all parties. (Betting and Loans (Infants) Act, 1892 (55 & 56 Vict. c. 4), s. 5. See above par 556.)

1125

A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder. (45 & 46 Vict. c. 61, s. 29 (3).) **1126**

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Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, and the holder must prove both that value has been given and that it has been given in good faith without notice of the fraud. (45 & 46 Vict. c. 61, s. 30 (2); *Tatam v. Haslar*, 23 Q. B. D. 345.)

1127

“For value received.”

The words “for value received” are not necessary. (Byles, 95.) **1128**

Inland and foreign bills or notes.

Bills or notes are either inland or foreign. **1129**

An inland bill or note is one which is, or on the face of it purports to be, both drawn or made and payable within the British Islands, or, in the case of a bill, drawn within the British Islands upon some person resident there. Any other bill or note is foreign. Unless the contrary appear upon the face of a bill or note, the holder may treat it as inland. (Byles, 131; 1 Rose. 341; 45 & 46 Vict. c. 61, ss. 4, 83 (4).)

1130

Foreign bills in parts.

Foreign bills are often drawn in three or more parts; all the parts being numbered, and together making what is called a set, and the whole set constituting but one bill. Each part contains a condition that it shall continue payable so long only as the others remain unpaid. This practice is adopted in order that if one be lost, the person entitled may recover his money on the other. (Byles, 131-3; Broom, Com. 477; 45 & 46 Vict. c. 61, s. 71.) **1131**

By what law bills are governed.

In the case of a bill drawn in one country and payable in another, the obligation of the acceptor, and of an indorser as his surety, is governed by the law of the

place where it is payable; but the obligation of the drawer by the law of the country where it was drawn. (Byles, 382-5; *Rouquette v. Overmann*, L. R. 10 Q. B. 525, 536-7.) **1132**

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On a bill of exchange payable to order, drawn, accepted, and payable in England, an indorsee may sue the acceptor in England, if the indorsement was valid by the law of England, though made in France and invalid there, and though the parties were all French subjects domiciled and resident in France. (*Lebel v. Tucker*, L. R. 3 Q. B. 77.) **1133**

A negotiable bill or note may be payable either to order or to bearer. It is payable to bearer when it is expressed to be so payable, or when the only or last indorsement is an indorsement in blank. It is payable to order when it is expressed to be so payable, or payable to a particular person, and does not contain words expressly or impliedly prohibiting transfer. (Byles, 93.) **1134**

If a bill or note is made payable to a particular individual, or his order or assigns, he may transfer his right to a third person by writing his own name upon it and delivering it to such third person; which is called an indorsement, because the name of the transferor is usually written on the back. If the bill or note is payable to bearer generally, or to a particular individual or bearer, it may be transferred by mere delivery. (Byles, 94.) **1135**

Original
transfer of a
bill or note.

The payee may be designated either by name or by description; as "the trustee acting under A.'s will"; or he may be a fictitious or non-existing person, when the instrument may be treated as payable to bearer; or a blank may be left for his name, when any *bonâ fide* holder may insert his own name, and recover against

Designation
of payee.

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Fictitious
person.

the drawer, or, if authorized by the drawer to insert it, against the acceptor. (Byles, 89-93; Chalm. B. 19-25; 45 & 46 Vict. c. 61, s. 7.) **1136**

What is a "fictitious person" within the meaning of sect. 7 of the Bills of Exchange Act, 1882, has recently been considered by the House of Lords in *Bank of England v. Vagliano* ((1891) A. C. 107), reversing *Vagliano v. Bank of England* (23 Q. B. D. 243). A bill, purporting to be drawn by A. to the order of C. & Co., and to be indorsed by them, was accepted by the drawee, payable at his bankers. The bank paid it at maturity. A. was a correspondent of the acceptor's, and was accustomed to draw bills in favour of C. & Co. In this particular instance, however, the names and signatures of the drawer and payees were forged by a clerk of the acceptor, who obtained the money. It was held that whenever a name is inserted in a bill as that of payee by way of pretence merely, without any intention that the payment shall be made in conformity therewith, the payee is a "fictitious person" within the meaning of the Bills of Exchange Act, 1882, sect. 7, sub-s. 3; and that the bankers in this case could debit the acceptor's account with the sum so paid, they having paid the bill to bearer. If, however, the bill had really been drawn in favour of C. & Co., and their signature had been forged, the loss would have fallen on the bankers. (See 45 & 46 Vict. c. 61, s. 60; Chalm. B. 21-4; *Clutton v. Attenborough*, (1897) A. C. 90.) The signature of a fictitious person must be distinguished from the forged signature of a real person, and from the signature of a real person using a fictitious name. (Chalm. B. 23.) **1137**

Application
of the law of
bills to notes.

The law of bills is generally applicable to notes. But in bills there are three original parties, namely, the

drawer, the drawee, and the payee, while in notes there are only two, namely, the maker and the payee, so that the points respecting the drawee and an acceptance have no application to a note. (Broom, Com. 488.)

1137a

But if indorsed by the payee, a promissory note becomes exactly similar to a bill of exchange; for then it is in effect an order by the indorser of the note upon the maker to pay to the indorsee; the indorser then stands in the situation of the drawer of a bill; the maker is in the position of the acceptor of a bill, as being the person primarily liable; and the indorsee becomes the payee. (Broom, Com. 488; Byles, 101.)

1138

Indorsements are either special or in blank. A full or special indorsement is one which mentions the name of a person in whose favour it is indorsed; as where by the indorsement of A. B. it is made payable to C. D. or order, as "pay Mr. C. D., or order A. B." An indorsement in blank is one which is effected by the holder merely writing his own name on the bill (usually and properly on the back of it), without making it payable to anyone in particular. (Byles, 171-2; 2 Ste. Com. 119; Ad. Con. 1105.)

1139

A bill or note indorsed in blank passes by mere delivery from the person to whom it was so indorsed in blank, and becomes payable to any bonâ fide holder. But a bill or note indorsed specially will not pass from the person to whom it was so indorsed specially without being indorsed by him, either specially or in blank. Whether indorsed specially or in blank, the instrument is delivered over to the assignee, who is called the indorsee; and he may also indorse it, either specially or in blank, so as to transfer it to another; and so on in infinitum. (Byles, 171-2; 2 Ste. Com. 119; Ad. Con. 1105.)

1140

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Similarity of
a note, when
indorsed, to a
bill.

Indorsement
of bills or
notes.
Full or special
indorsement.

Indorsement
in blank.

Transfer of a
bill or note
indorsed in
blank or
specially.

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Bill indorsed
specially, and
afterwards in
blank, and
vice versâ.

It will be seen from the foregoing paragraph, that a bill which has been specially indorsed to anyone may afterwards be indorsed by him in blank; and that a bill which has been indorsed in blank may afterwards be indorsed specially by the holder in favour of himself or some other person. The last indorsement governs the instrument. (Chalm. B. 24-5; Byles, 172; Ad. Con. 1105-6.) **1141**

Indorsement
in autre droit.

Persons acting in autre droit (as agents, executors, and administrators) may render themselves personally liable, by making, drawing, accepting, or indorsing bills or notes without using such special words as may prevent such liability. (Byles, 39, 64.) **1142**

Restrictive
indorsement.

An indorsement may be restrictive, that is, so worded as to deprive the instrument of negotiability: thus, "Pay the contents to J. S. only," or "to J. S. for my use." (Byles, 180-1; Broom, Com. 456; Chalm. B. 112-4.) **1143**

But though an indorsement be made specially to a person without the words "or order," he may nevertheless transfer by his indorsement. And, as we have seen, where the drawer or maker has, in the body of the instrument, made it payable to a particular individual, without adding words of transfer, such as "or order," it is transferable, upon such person indorsing, if it does not contain words prohibiting transfer, or indicating an intention that it shall not be transferable. (Byles, 93, 172; 2 Ste. Com. 119.) **1144**

Conditional
indorsement.

Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer; and payment to the indorsee is valid whether the condition has been fulfilled or not. (45 & 46 Vict. c. 61, s. 33.) An indorsement running "pay to the order of C. on his marriage with B." would be conditional. As between

indorser and indorsee the condition would presumably be operative. (Chalm. B. 110.) **1145**

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The drawer of a bill and any indorser may insert therein an express stipulation negating or limiting his own liability to the holder. Thus he may add the words "sans recours." (Chalm. B. 39.) **1146**

Qualified
indorsement.

A bill may be indorsed by a person "per proc.," which imports that the indorser is an agent only, and if he had no authority the holder will have no redress against the principal. **1147**

Indorsement
per procura-
tionem.

A drawer or indorser may insert the name of a person to whom the holder, at his option, may resort if the bill is dishonoured by non-acceptance or non-payment. Such person is called a referee in case of need. (45 & 46 Vict. c. 61, s. 15.) **1148**

Referee in
case of need.

The transfer of a bill or note may in general be made by any holder, or his agent, trustee in bankruptcy, or legal personal representative. (Byles, 197-8.) **1149**

Who may
transfer.

If, however, a person has stolen or found, or has no right to indorse a bill or note, which is made payable to order, and not indorsed in blank, so as to become payable to bearer, he can convey no title to it. But a person who has stolen or found a bill or note made or become payable to bearer, may convey a title to it to a person acquiring it from him *bonâ fide* and for valuable consideration. (Broom, Com. 457; Byles, 187.) **1150**

The transfer of a bill by indorsement may be before acceptance, or even before its date or before the amount is filled in, or before it is drawn, and either before or, to some extent and under certain qualifications, after maturity, that is, the time when it becomes due. If an indorsee pays a bill at maturity or after it is due, he may afterwards indorse or negotiate it. But if the acceptor or maker pays a bill or note at maturity, or

Time of
transfer.

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the drawer of an accommodation bill pays it at maturity, it ceases to be a negotiable instrument; no person remains liable on it, and consequently no person can sue on it. Payment before it is due does not extinguish it, any more than if it were merely discounted. (Broom, Com. 458; Byles, 189, 194-5.)

1151

Position of a person who takes a bill or note overdue.

He who takes a bill, note, or cheque overdue, takes it subject to the equities (if any) naturally arising out of the transaction, to which it was subject in the hands of the person from whom he received it; such as the satisfaction or payment of the bill to the prior holder: and he has no better title to it than the person from whom he takes it, if lost or stolen. (Byles, 190; Ad. Con. 1114.) **1152**

Delivery.

Delivery of the bill with the intention of passing the property in it, is necessary to perfect an indorsement; but it will be presumed, unless disproved. (Byles, 173-4; Chalm. B. 54-5.) **1153**

Operation of a bill.

A bill of exchange payable to a third person operates as an undertaking, from the drawer to the payee and every subsequent holder fairly entitled to the possession, that the drawee, who is the person primarily liable, is competent to accept, i.e., to engage to pay it; and that he will, when requested, accept, and, when due, pay it: and that if the drawee fail to do either, he, the drawer, will pay the amount, provided he have due notice of the dishonour. (Byles, 4, 174.) **1154**

Operation of a note.

A note operates as an undertaking, by the maker to the payee and every subsequent holder fairly entitled to the possession, that he will make the payment therein specified. (Byles, 4; Sm. Merc. Law, 227.)

1155

Liability of

Every person who indorses a bill or note becomes a

surety, and undertakes thereby, to the indorsee and every subsequent holder, that the bill or note shall be discharged by the drawee or maker when it becomes due: in fact, he is in many respects like the drawer of a new bill, and is liable to succeeding holders, in default of acceptance or payment by the drawee or maker. But where a note, made by a company, was indorsed by three directors in succession, it was held that, in an action for contribution, evidence was admissible to show that they indorsed as co-sureties, and not as sureties in succession. (*Macdonald v. Whitfield*, 8 App. Cas. 733.) **1156**

The acceptor of a bill or the maker of a note are primarily and absolutely liable upon the bill or note, even after indorsement: the drawer of a bill and each indorser of a bill or note are only collaterally and conditionally liable to the holder, in the event of the acceptor's or maker's default, and of the holder presenting the instrument according to its tenor and giving due notice of the failure of the acceptor or maker to pay upon a proper presentment. **1157**

But although all the other parties are only sureties, as between themselves and the acceptor, yet each prior party is a principal, as between himself and each subsequent party. Hence, as between the holder, on the one hand, and the acceptor and other parties, on the other, the acceptor is the principal debtor, and the other parties are his sureties. But, as between the holder, on the one hand, and the drawer who has indorsed and other indorsers, on the other, the drawer is a principal debtor, and the other indorsers are his sureties. And each subsequent indorser is a surety for each prior indorser. But an indorser, as such, is not liable to the acceptor. And a subsequent indorser, as such, is not

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the parties to
a bill or note.

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Transferor
by delivery.

liable to a prior indorser. (Chalm. B. 189; and see *Macdonald v. Whitfield*, 8 App. Cas. 733.) **1158**

The transfer of a bill or note by mere delivery does not amount to such an undertaking as that which an indorsement imports. The holder of a bill or note made or become payable to bearer, who negotiates it without indorsing it, is called a transferor by delivery, and is not liable on the instrument. He, however, warrants to his immediate transferee, being a holder for value, that the bill or note is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless. (Byles, 181-2; Chalm. B. 195-6; 45 & 46 Vict. c. 61, s. 58.) **1159**

If a bill or note made or become payable to bearer be transferred, without being indorsed by the transferor, for goods or other bills or notes, or for money paid at the time, the transaction has been held to be a sale of the bill or note; and the transferor by delivery is not obliged to pay the value of the goods or refund the money if the bill or note is bad, unless it was given for a pre-existing debt, or there was a contract express or implied that the transferor should be liable so to do, or the bill or note was forged, or the transferor had reason to believe it to be of no value. (Byles, 182-5; Chalm. B. 84, 194-6.) **1160**

Stipulations
by drawer or
indorser.

The drawer of a bill and any indorser may insert in it an express stipulation, negating or limiting his own liability to the holder, or waiving as regards himself some or all of the holder's duties. (45 & 46 Vict. c. 61, s. 16.) **1161.**

A person may indorse a bill or note in such a way as to transfer his interest to the indorsee, without rendering himself personally responsible for its pay-

ment, by adding to his indorsement, the words "sans recours," or "without recourse to me," or equivalent words. (Byles, 175.) And this qualified indorsement is the proper mode of indorsement by an agent, where it is not intended that he shall be personally liable. (Byles, 39, 40, 42.) **1162**

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And by a written or even verbal agreement that the indorsee shall not sue the indorser, an indorser may protect himself from being sued by his immediate indorsee or those merely standing on his title, but not against subsequent transferees for value without notice of the agreement. (Byles, 176.) **1163**

As between an indorser and his indorsee, there must, in order to make the indorser liable to his indorsee, be an intention to stand in the ordinary relation of indorser to him, that is, to guarantee the payment, if the acceptor makes default. (*Denton v. Peters*, L. R. 5 Q. B. 475.)

1164

If the secretary of an incorporated company expressly signs a promissory note as secretary, and "for" the company, though he uses the words "I promise," he will not be personally liable. (*Alexander v. Sizer*, L. R. 4 Ex. 102.) **1165**

Note signed
by a
secretary.

Every holder of a bill ought to present it in due time for acceptance, when necessary. (Byles, 205; Ad. Con. 1,118; Chalm. B. 131-9.) The request by the holder to the drawee, to accept the bill, is called a presentment for acceptance. **1166**

Presentment
of a bill for
acceptance.

As there is no drawee in a note, there can, of course, be no presentment for acceptance, but yet, when a note is payable at sight, or within a certain time after sight, it must be presented to the maker in order that the time for making payment may be ascertained. (Byles, 88, 205 note (b).) **1167**

Presentment
of a note.

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Where presentment for acceptance is necessary.

In general, the holder of a bill is not bound to present for acceptance. But if a bill is made payable after sight, or expressly stipulates that it shall be presented for acceptance, or is drawn payable elsewhere than at the residence or place of business of the drawee, a presentment for acceptance is of course indispensable. And even where presentment for acceptance is not necessary, it is usual and prudent, since the holder, if he succeeds in obtaining the acceptance of the drawee, gains the additional security of the drawee, which is likely to render the bill more negotiable; and if he does not succeed, his remedy against the drawer and indorser is accelerated; for he may sue them immediately. (Byles, 205; Chalm. B. 131-9; 45 & 46 Vict. c. 61, s. 39.) **1168**

Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time with the exercise of reasonable diligence to present the bill for acceptance before presenting it for payment on the day that it becomes due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer or indorsers. (45 & 46 Vict. c. 61, s. 39 (4).) **1169**

Time for presentment

Presentment for acceptance must be within reasonable time, depending on the nature of the bill, the usage of trade, and the circumstances of the case. (Byles, 206; 45 & 46 Vict. c. 61, s. 40.) **1170**

Acceptance.

An acceptance of a bill is the signification by the drawee of his assent to the order of the drawer; or an engagement to pay the bill, when due, in money. (Byles, 251; 45 & 46 Vict. c. 61, s. 17.) **1171**

How made.

An acceptance must be in writing on the bill, and signed by the drawee or by someone authorized by him. The mere signature of the drawee is sufficient. It

is usually made by the acceptor writing the word "accepted" across the bill, and signing his name. (Byles, 257-8; 45 & 46 Vict. c. 61, s. 17.) **1172**

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An acceptance must not express that the drawee will perform his promise by any other means than the payment of money. (45 & 46 Vict. c. 61, s. 17.) **1173**

A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete. (Byles, 254.) **1174**

Acceptance,
when made.

On presentment for acceptance, the drawee is entitled to a reasonable time to decide whether he will accept. Under ordinary circumstances, custom allows twenty-four hours. (Byles, 209; Chalm. B. 138.) **1175**

Time allowed
to accept.

An acceptance may be either general (otherwise termed absolute) or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular it is provided that an acceptance is qualified which is (1) conditional, that is, making payment by the acceptor dependent upon a stated condition; (2) partial, that is an acceptance to pay part only of the bill as drawn; (3) local, that is an acceptance to pay only at a particular specified place, and an acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only and not elsewhere; (4) qualified as to time; (5) qualified by the acceptance of some one or more of the drawees, but not of all. If the holder accepts a qualified acceptance, which he may refuse, he should give notice of the qualified acceptance to the antecedent parties, and should state that he is ready to take it, if they will consent; and they will be deemed to have assented unless they dissent

Different
kinds of
acceptances.

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in a reasonable time. If he refuses such an acceptance, he must give notice of dishonour to them. (1 Rose. 352; Byles, 259-60; Chalm. B. 48-9, 140; *Decroix v. Mayer*, (1891) A. C. 520; 45 & 46 Vict. c. 61, s. 19.)

1176

A bill may either be accepted simply, or accepted payable at a particular place. And a bill may be made payable at one place, and accepted payable at another place. If a person draws or accepts a bill payable at the house of a banker or other place, without the expression of an intention that it should not be payable elsewhere, there, in an action against the *acceptor*, such acceptance is to be deemed a general acceptance; so that presentment at that place need not be averred or proved; and presentment for payment, either at the banker's or at such other place or to the acceptor himself, will suffice. But it is otherwise in the case of a note, or of an action against the drawer or indorsers of a bill drawn or accepted payable at a particular place; for, in such case, the bill must have been presented there, in order to charge the drawer or indorsers. (Byles, 261, 284-5; 2 Ste. Com. 121-2; 1 Rose. 353; 45 & 46 Vict. c. 61, ss. 19 (c), 87; see *infra*, par. 1182.) **1177**

What an
acceptance
admits.

He who accepts a bill thereby (1) engages to pay it according to the tenor of his acceptance, (2) is precluded from denying to a holder in due course (a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to the drawer's order, the then capacity of the drawer to indorse, but not the genuineness or the validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the

genuineness or validity of his indorsement. (Byles, 266-7; Chalm. B. 183-5; 45 & 46 Vict. c. 61, s. 54.)

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1178

Where the drawee cannot, will not, or does not accept, and the bill is protested for dishonour by non-acceptance, or where the bill is protested for better security and is not overdue, as where the acceptor is insolvent, some other person, not being a person already liable thereon, may, with the consent of the holder, accept the bill for him to prevent his being sued. Such an acceptance is called an acceptance for honour *supra* protest. (Byles, 269-74; Chalm. B. of E. 226-30. As to the meaning of protest, see below, par. 1202.)

Acceptance
for honour.

1179

A bill may be drawn, accepted, or indorsed by a person "per proc.," that is, per procuration; which imports that the drawer, acceptor, or indorser is acting as agent under a limited authority; and if he has no authority, or has exceeded his authority, the holder of the bill will have no redress against the principal or supposed principal. (Byles, 41; Chalm. B. 75-7; 45 & 46 Vict. c. 61, s. 25; *Reid v. Rigby*, (1894) 2 Q. B. 40.)

Drawing,
accepting, or
indorsing per
proc.

1180

An acceptance is revocable, and may be cancelled before the bill is delivered, unless the acceptance is written on the bill, and the drawee gives notice to or according to the directions of the person entitled to the bill, that he has accepted it. (Byles, 263; 45 & 46 Vict. c. 61, s. 21.)

Revocation of
acceptance.

1181

A presentment to the acceptor or maker for payment is not generally necessary in order to charge him, even in the case of a bill or note made payable on demand; the commencement of an action against him being a sufficient demand. But if a bill is payable after sight at a particular place, but not elsewhere, presentment is

Where pre-
sentment for
payment is
necessary.

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necessary even to charge the acceptor. And if a note is, in the body of it, made payable at a particular place, it must be presented at that place in order to charge either maker or indorsers, but if the place of payment is indicated by way of memorandum only, presentment there or elsewhere to the maker is sufficient to charge the indorsers. And the presentment of a bill to the drawee or acceptor, or of a note to the maker for payment, is necessary in all cases where it is sought to charge the drawer or indorser of a bill or the indorser of a note. (Byles, 285, 287-8, 290; 1 Rose. 352, 354; 45 & 46 Vict. c. 61, ss. 45, 52, 86-7.) **1182**

To whom presentment for payment should be made.

It is not necessary to make a personal demand on the acceptor of a bill. It is sufficient to demand payment of the acceptor's wife or other agent, at his residence or place of business. Where a bill or note is accepted or made payable at a particular place, a presentment at all the banking-houses in that place will suffice. If the acceptor or maker is dead, the presentment must be to his legal personal representative, if he can be found. Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to all. Where authorized by agreement or usage, a presentment through the post is sufficient. (Byles, 287-8; 1 Rose. 368; Chalm. B. 145-7; 45 & 46 Vict. c. 61, s. 45.) **1183**

When presentment for payment must be made.

In order to charge the drawer or indorsers of a bill, a holder must promptly present it for payment when it becomes payable as a matter of right; and the rule is, that if a bill is payable on demand in the place where it is received, it must be presented during banking hours, if the person to pay is a banker, or otherwise at a reasonable hour, not later than the day after it is received. If payable elsewhere, it must be forwarded by the regular post, not later than the day after it

is received, or, in the case of a foreign bill, by the next ordinary conveyance; and it will suffice if the party receiving it by post presents it on the next day. (Byles, 275-6, 283; 45 & 46 Vict. c. 61, s. 45.) **1184**

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In the case of bills or notes payable otherwise than on demand, whether they are expressed to be payable at a particular day, or at a certain number of days, weeks, months, or years, after sight or after date, or at usance, or by instalments, or on a particular event, are deemed not to be really payable till the expiration of a certain number of days afterwards, called days of grace, which vary in number in different countries. In England, three days of grace are allowed, unless the third day is a day of public rest (other than a bank holiday, for which see *infra*, par. 1189); in which case the bill or note is payable on the preceding business day. In computing the time when a bill or note falls due, the day of its date is excluded, and the day of payment included. And so, in reckoning the days of grace, the day on which the bill or note falls due is excluded, but the last day of grace is included. Thus, a bill payable six days after sight would purport to be payable on the seventh, and must be presented on the tenth. But in the case of a bill or note expressed to be payable on demand or payable generally (which is in effect on demand), no days of grace are allowed. And in such case, if the bill or note falls due on a day of public rest, it must be paid on the preceding day. (Byles, 276-9; 45 & 46 Vict. c. 61, s. 14.) **1185**

By the stat. 34 & 35 Vict. c. 74 (passed 14th August, 1871), it was enacted that bills or notes, payable at sight or on presentation, should bear the same stamp as, and should for all purposes be deemed to be, bills or notes payable on demand. **1186**

Bills payable
at sight or on
presentation
to be payable
on demand.

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By stat. 45 & 46 Vict. c. 61 (passed 18th August, 1882), the former Act was repealed, but it is provided by sect. 10, "(1) A bill is payable on demand—(a) which is expressed to be payable on demand, or at sight, or on presentation; or (b) in which no time for payment is expressed. (2) Where a bill is accepted or indorsed when it is overdue, it shall, as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand." And this section is expressly made applicable to notes as well as to bills. **1187**

In the case, therefore, of bills or notes comprised in the above section, no days of grace are allowed. **1188**

Bank
holidays.

In the case of bank holidays, i.e., Easter Monday, the Monday in Whitsun week, the first Monday in August, and the 26th of December, if a week-day, and such other days as may be appointed, bills and notes which are due and payable on any such bank holiday are presentable and payable on the day following such day. (Chalm. B. 34-7; 45 & 46 Vict. c. 61, s. 14.)

1189

Usances.

A foreign bill is frequently drawn payable at one usance, or two or more usances. A usance is the period for payment which is customary between the places where the bills are drawn and payable; and a half usance is half that period, provided that when usance is a month, half usance is always fifteen days, without reference to the unequal length of the months. Thus, a usance between this country and Venice being three calendar months, and six days of grace being allowed, exclusive of days on which the bank is shut, a bill drawn on Venice at two usances, and dated the 1st of January, would be actually payable on the 7th of July, or, if a Sunday, holiday, or day on which the

bank is shut, intervened, on the 8th of July. (Byles, 89, 277; Broom, Com. 477.) **1190**

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The maker or acceptor will not be discharged by non-presentment for payment on the very day when the bill or note becomes due; because they are the parties originally and primarily liable. But the drawer and all the indorsers, who are looked upon as sureties for the acceptor, will be discharged, if a presentment is not made upon the very day, or if proper notice of dishonour is not given, even though the drawer or indorsers may have knowledge of the fact. This rule would seem to depend on the principle that the enforcing the presentment for payment and the giving notice of dishonour in proper time, generally tends to give the drawer of the bill or an indorser of the bill or note a better opportunity of withdrawing his effects from or preventing them from reaching the drawee or maker, for which the bill or note is supposed to be drawn or made; and to give the indorsers a better opportunity of recovering the money; and to let the parties know that the holder does not intend to give credit to the acceptor. (Byles, 240, 288-9; 45 & 46 Vict. c. 61, s. 52.) **1191**

Consequence
of non-pre-
sentment in
due time.

Except under certain special circumstances, if a bill or note is refused acceptance or payment, notice of such refusal, technically termed dishonour, must be given by the holder or an indorser who is liable to be sued upon it, or by an agent who holds the bill, as a banker or solicitor, even in the agent's own name, to the drawer (unless he had no remedy against anyone, and therefore could not be prejudiced by want of notice), and each indorser, or to the agent or the personal representative or the trustee in bankruptcy of such party or parties. A notice to the acceptor or

Notice of dis-
honour.

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maker, or to a transferor without indorsement of a bill or note transferable by mere delivery, is not necessary. **1192**

A notice, given within due time, by the holder, enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given. Where notice is given on behalf of an indorser entitled to give notice it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given. The notice may be given in writing or by personal communication, in terms which sufficiently identify the bill, or by the return of the dishonoured bill to the drawer or an indorser. (45 & 46 Vict. c. 61, s. 49.) **1193**

The best course for the holder to adopt, is, to give notice to all the parties whom he wishes to sue, lest they should not receive notice in due time from any other party. But the holder can sue the drawer, even upon a notice given to the last indorser only, if each indorser has in due time given his notice of dishonour to his next preceding indorser and the first indorser to the drawer. Default on the part of any one indorser in giving notice in due time breaks the chain of notices, and disqualifies the holder from suing the drawer, or any indorser prior to the defective link, unless notice has been given by the holder himself to the drawer, or any such prior indorser, within the time allowed the holder for giving notice. (Byles, 234; Chalm. B. 152-65; *Turner v. Samson*, 2. Q. B. D. (Ap.) 23; *Foster v. Parker*, 2 C. P. D. 18.) **1194**

When notice
of dishonour
should be
given.

Notice, whether given by the holder, or by any indorser or other person who has himself received notice, must, if given to a party who resides in or near the place where the bill was dishonoured or where

the giver of the notice himself received notice, be given in such a manner that such party may receive it by the expiration of the day after the dishonour, or after the time when the giver of the notice himself received notice. Notice to a party who is not living in or near the same place, must be sent off on the day after the dishonour of the bill if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter, or in the case of a foreign bill, by the next ordinary conveyance. These rules express the amount of time allowed under ordinary circumstances. But in certain special cases where it is impossible to give notice within the time, as where the abode or place of business of the person to whom notice is to be given cannot be found, such further time is allowed as may be reasonable. (45 & 46 Vict. c. 61, s. 49.) **1195**

If the holder, instead of trusting to others to give or forward notice, himself gives notice to all the prior parties, he has only the same time for giving notice to all, as to one. Each indorser or other party, however, "has his day" for giving notice; that is, the time above specified. But if any indorser gives notice sooner than he need, no more time will be allowed on that account to the other parties to give notice. A banker with whom a bill is deposited to receive payment has a day to give notice to his customer, and the customer has another day to give notice to the antecedent parties. Sundays, and other days of public rest, and probably days on which the peculiar creed of the religious denomination to which a man belongs prohibits him from transacting his ordinary business, are excluded from the time within which notice of dishonour must be given. And if a person receives on

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such a day notice of dishonour, he will be considered as having received it on the following day. (Byles, 227-31; 1 Rose. 372.) **1196**

Notice of dishonour need not be given to an indorser before his right to demand payment of the acceptor has accrued, and the liability of the indorser consequent on such refusal has arisen. (*Rouquette v. Overmann*, L. R. 10 Q. B. 525, 539.) **1197**

What
amounts to
notice.

The notice may be either written or verbal, or partly written and partly verbal, and if a written notice is despatched by the post, it is sufficient, though it be not received. (Byles, 220, 223; Broom, Com. 463; 1 Rose. 370, 372, 374; 45 & 46 Vict. c. 61, s. 49 (5), (15).) **1198**

Consequence
of not giving
notice of dis-
honour.

Any drawer or indorser to whom notice of dishonour by non-acceptance or non-payment of a bill, or by non-payment of a promissory note, ought to have been, but was not, given, is discharged. (45 & 46 Vict. c. 61, s. 49.) It lies on the plaintiff to prove that notice of dishonour was given in due time, and was received, or is to be deemed to have been received, before action brought: otherwise the drawer and indorsers will be discharged. (Byles, 219, 231; Broom, Com. 464.)

1199

When notice
of dishonour
dispensed
with.

In certain cases notice of dishonour is dispensed with: (1) Where notice cannot be given, or does not reach the drawer or indorser sought to be charged. (2) By waiver, express or implied. (3) As regards the drawer, when the drawer and drawee are the same person; or where the drawee is a fictitious person, or a person not having capacity to contract; or where the drawer is the person to whom the bill is presented for payment; or where the drawee or acceptor is, as between himself and the drawer, under no obligation to

accept or pay the bill (e.g., an accommodation acceptor, *Bickerdike v. Bollman*, 2 Sm. L. C. 99); or where the drawer has countermanded payment. (4) As regards the indorser, where the drawee is a fictitious person, or a person not having capacity to contract, and the indorser was aware of the fact when he indorsed; where the indorser is the person to whom the bill is presented for payment; where the bill was accepted or made for his accommodation. (Chalm. B. 164-8.)

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1200

A foreign dishonoured bill should in general be protested, and information of the protest sent with the notice of dishonour, if the person to whom the notice of dishonour is given is abroad. Foreign promissory notes need not be protested. Inland bills may be protested, but it is not necessary or usual: they are usually noted for non-payment, although even that is unnecessary. (Byles, 211, 215; Broom, Com. 477; 2 Ste. Com. 125; 1 Rose. 375; 45 & 46 Vict. c. 61, s. 51 (1).) **1201**

Noting and
protesting.

Noting is a minute made by a notary public of the fact of presentation and dishonour of the bill. Protesting is a declaration by a notary that the bill has been presented and dishonoured. (Byles, 211, 214, 215; Chalm. B. 171.) **1202**

The payment of a bill or note must be made at some time within business hours, in the course of the day when it is due, to the true holder or his representatives. (Byles, 293.) **1203**

Payment.

A holder in due course may enforce payment against all or any one or more of the parties liable on the bill, who, as against him, are liable *pari passu* after due presentment and notice of dishonour where requisite; and he holds free from any defect of title of prior parties as well as from personal defences available to

Against
whom pay-
ment may be
enforced.

such parties among themselves. (Byles, 139; 45 & 46 Vict. c. 61, s. 38.) **1204**

Each indorser who in turn is called upon and obliged to pay, may have recourse to any indorser, prior to himself in order, who has had due notice of dishonour; each indorser (usually beginning at the last) taking back from his immediate indorser what he himself has paid on account of the bill, and at the same time delivering up the bill to him: or any indorser so obliged to pay may sue the drawer or acceptor, instead of any preceding indorser. (2 Ste. Com. 123.) **1205**

Where a bill not payable to the drawer's own order has been dishonoured, and the drawer takes it up, that is, pays it, he may sue the acceptor. (1 Rose. 364.) **1206**

As the maker of a note is the person primarily and absolutely liable, even after indorsement, the holder of an indorsed note must present it in the first instance to the maker for payment; but, on his failure to pay, the holder may resort to the indorsers. Each indorser, however, after the first, has the right of recourse against the persons whose names are anterior to his own; but the first indorser or original payee has no remedy except against the maker himself. (2 Ste. Com. 123; Byles, 285; 45 & 46 Vict. c. 61, ss. 45, 86; but see *Macdonald v. Whitfield*, 8 App. Cas. 733, par. 1156, above.) **1207**

The holder is not obliged to proceed against one party only. He may separately sue, in distinct actions, all the parties either contemporaneously or successively; but on payment of the bill and costs by one, proceedings against the others will be stayed. (Byles, 139; 45 & 46 Vict. c. 61, s. 38.) **1208**

Amount
recoverable.

On dishonour, the measure of damages, which are deemed liquidated damages, is (1) the amount of the

instrument; (2) interest from the time of presentment for payment if payable on demand, and from maturity in any other case; (3) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest. In the case of a bill dishonoured abroad in lieu of the above damages (1) amount of the bill with the expenses of the re-exchange; (2) interest thereon until payment. (*In re Gillespie, Ex parte Roberts*, 18 Q. B. D. 286; Byles, 439-40; 45 & 46 Vict. c. 61, s. 57.) **1209**

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A bill of exchange, draft, or order, having thereon an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel such stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so doing, so that each stamp (if more than one) may be effectually cancelled and rendered incapable of being used for any other instrument, or unless it is otherwise proved that each stamp appearing on the instrument was affixed at the proper time. The penalty for wilful neglect or refusal to cancel is 10*l*. (Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 8.) **1210**

Cancelling
stamp on pay-
ment.

The person paying a bill or note is entitled to a receipt. Formerly a receipt for the money given on the back of the stamped bill or note did not require an additional stamp; but such additional stamp is now necessary. (Finance Act, 1895, 58 Vict. c. 16, s. 9.)

1211

The person who pays a bill or note has a right to have it delivered up to him. (45 & 46 Vict. c. 61, s. 52 (4).) But it appears to have been decided that payment of a bill or note, not negotiable, cannot be refused until it is delivered up. (Byles, 303; *Wain v. Bailey*, 2 P. & D. 507.) **1212**

Delivering up
a bill or note
on payment.

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Payment
supra protest
or for honour.

When payment of a bill, whether inland or foreign, is refused, and has been protested for non-payment, any party or any stranger may pay it for the honour of any of the parties; but the payment, in order that it may not operate as a mere voluntary payment, must be attested by a notarial act of honour founded on a declaration by the payer or his agent, of the payer's intention to pay the bill for honour, and for whose honour he pays; and such payment is termed payment *supra protest*, or for honour. (Byles, 305-7; 45 & 46 Vict. c. 61, s. 68.) **1212a**

Suspension by
renewal.

The holder may renew a bill or note, that is, he may take another bill or note in continuance of it, holding the first; which will have the effect of suspending his right of action on the first bill or note till the substituted bill or note is at maturity. But the taking of a new bill from the acceptor, payable at a future day, discharges the indorsers. And if the new bill is paid, the holder cannot sue on the first bill, though it may have been left in his hands. (Byles, 313, 377.) **1213**

Adding a con-
dition or
qualification.

A bill or note or an acceptance cannot be rendered conditional or qualified by a contemporaneous verbal agreement; though oral evidence is admissible to deny the receipt of value. (Byles, 112; Broom, Com. 467-8; 1 Rose. 390-1; Chalm. B. 57; *Young v. Austen*, L. R. 4 C. P. 553; *Abrey v. Crux*, L. R. 5 C. P. 37.) But a contemporaneous written agreement on a distinct paper, to renew, or in other respects qualify the liability of the maker or acceptor, is good as between the original parties and their representatives, but not as against third persons who have no notice of it. (Byles, 111; Broom, Com. 467; 1 Rose. 391; *Young v. Austen*, L. R. 4 C. P. 553; *Maillard v. Page*, L. R. 5 Ex. 312.)

1214

Where an alteration is immaterial (as where it only expresses the effect of the note as it originally stood), it does not render the bill or note invalid. (*Aldous v. Cornwell*, L. R. 3 Q. B. 573.) But any material alteration of a bill or note after it has been issued, unless satisfactorily accounted for, invalidates it, as against parties not consenting to the alteration. Thus, in *Master v. Miller*, 1 Sm. L. C. 747, it was held that an unauthorized alteration of the date of a bill after acceptance, whereby the payment would be accelerated, avoided the bill. And even though the alteration is made by consent, the instrument is a new contract, requiring a new stamp, unless such alteration was made to correct a mistake, and render the bill or note what it was originally intended to be. (Byles, 333-9; Chalm. B. 213-18; 1 Rose. 385.) **1215**

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Alteration.

The rigour of the common law rule has, however, been somewhat mitigated in favour of a holder in due course by the Stat. 45 & 46 Vict. c. 61, s. 64, which enacts, that: (1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill, as if it had not been altered, and may enforce payment of it according to its original tenor. (2) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent. **1216**

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The proviso is not retrospective, and does not apply to Bank of England notes. (*Leeds Bank v. Walker*, 11 Q. B. D. 84.) The alteration of the number on a Bank of England note is material, and invalidates it. (*Suffell v. Bank of England*, 9 Q. B. D. 555.) **1217**

In a recent case a bill was drawn for 500*l*. The stamp was sufficient to cover 4,000*l*., and blanks were left before the amount of the bill. After acceptance the drawer fraudulently altered the amount to 3,500*l*., and the bill got into the hands of a holder in due course. It was held he could recover 500*l*. from the acceptor, but not more, there being no duty on the acceptor to take reasonable care that the bill was so framed as to offer no temptation to commit a crime. (*Scholfield v. Londesborough*, (1896) A. C. 514.) **1218**

Extinguish-
ment.

If the plaintiff obtains from the defendant a co-extensive security of a higher description, as, for instance, a deed or a judgment (not being a collateral security only), the defendant's liability on the bill or note will be extinguished; but until satisfaction of the debt the holder may proceed on the bill or note against any other distinct party to it not jointly liable with the original defendant. (Sm. Merc. Law, 289; Byles, 312-3; 1 Rose. 392.) **1219**

Satisfaction.

All parties subsequent to the person by whom a bill or note is satisfied, and all prior parties for his accommodation, are released by such satisfaction. (Sm. Merc. Law, 289-90.) **1220**

Discharge.

A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. Also where the acceptor of a bill is or becomes the holder of it at or after its maturity *in his own right*, the bill is discharged. Also where the holder of a bill, at or after its maturity, absolutely and unconditionally renounces

his rights against the acceptor, provided that either the renunciation be in writing or the bill be delivered up to the acceptor. And the liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after, maturity, but not so as to affect the rights of any holder in due course without notice of the renunciation. (1 Rosc. 391-4; 45 & 46 Vict. c. 61, ss. 61-2; *Edward v. Walters*, (1896) 2 Ch. 157.) **1221**

If a creditor discharges the prior parties, the principal debtors, or effectually binds himself to give them time, however short, the sureties are discharged. But a discharge to the subsequent parties, the sureties, is not a discharge of the prior parties, the principal debtors. As between the holder, and the maker of a note or the acceptor of a bill, the maker or acceptor is considered the principal, and the drawer and indorsers his sureties; and consequently, if the holder either discharges or effectually binds himself to suspend his remedy against the maker or acceptor, the drawer and indorsers are discharged thereby; unless they have previously consented to it, or waived their right of discharge by a subsequent promise to pay, with knowledge of it; or unless it was agreed at the time between the holder and the maker or acceptor that the sureties should not be discharged. As between the holder and the drawer of a bill, the drawer is considered as the principal and the indorsers as his sureties. And a subsequent indorser is regarded as a surety for the prior one; and, therefore, if the holder discharges, or effectually binds himself to give time to a prior indorser, he discharges the subsequent indorsers. (Byles, 318-20; 1 Rosc. 394-5, 462.)

1222

The holder's discharge of one joint maker of a note

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operates as a discharge of the other. (Byles, 329.)

1223

Payment of a
forged or
altered
cheque.

If a banker pays a forged cheque, he must bear the loss himself; and if he pays a cheque which has been fraudulently altered in amount, he will have to suffer, unless the drawer has, by his gross fault, facilitated the commission of the fraud. (Broom, Com. 481-2; Byles, 25.) **1224**

Forged or un-
authorized
signature.

A forged or unauthorized signature confers no right or title to a bill or cheque unless the party against whom it is sought to retain or enforce payment of the bill, is precluded from setting up the forgery, or want of authority. (Byles, 39, 348; 45 & 46 Vict. c. 61, s. 24.) **1225**

If a banker pays a bill bearing a forged indorsement, he, and not his customer, will suffer. But if the payee is a fictitious person the bill is payable to bearer, and the loss will fall on the customer. (Broom, Com. 475; Byles, 346; *Robarts v. Tucker*, 16 Q. B. 560; *Bank of England v. Vagliano*, (1891) A. C. 107.) **1226**

But a draft or order (which includes a cheque) drawn upon a banker, for a sum payable to order on demand, which, when presented for payment, purports to be indorsed by the person to whom the same is drawn payable, is a sufficient authority to the banker to pay the amount to the bearer, though the signature indorsed be a forgery. (16 & 17 Vict. c. 59, s. 19; 45 & 46 Vict. c. 61, s. 60.) But this enactment does not protect any other person than the banker on whom the draft or order is drawn. It does not protect any other banker who cashes it on the faith of the indorsement. So that if a cheque is drawn upon a banker, and made payable to order, and crossed, and gets into the hands of another person, who forges the name of the payee,

and gets it cashed by another banker on the faith of the indorsement, and such other banker gets the money from the banker on whom it was drawn, the drawer of the cheque can recover the money from the banker who cashed it. (*Arnold v. Cheque Bank*, 1 C. P. D. 578.)

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1227

It was held by the Court of Appeal, affirming the decision of the Court below, that an indorsement of a cheque payable to order, purporting to be made by the agent of the person to whom the cheque is payable, is, by virtue of the provisions of the stat. 16 & 17 Vict. c. 59, s. 19, a sufficient authority to the banker to pay the amount of the cheque, though the person who indorsed it had no authority to indorse. (*Charles v. Blackwell*, 2 C. P. D. 151.)

1228

If a person steals or finds a bank-note, or discounts or cashes a bank-note for, or otherwise receives it from, one who (as he knows) stole or found it, he may be compelled by the owner to restore it. But if a person receives a bank-note from a thief or finder bonâ fide in the ordinary course of business, the owner has no remedy at common law against the person by whom it is so received. (2 Rose. 958-9; Ad. Torts, 536-8; Broom, Com. 492; Grant, 357; Byles, 186-7.)

1229

The owner of a bill, note, or negotiable security, may recover it from one who discounts it, or changes it, or receives it by way of deposit, having reason to suspect that the person from whom he received it was not the owner of it. (Ad. Torts, 537; 2 Rose. 959; Byles, 397.)

1230

If a person finds or steals a bill or note which may pass by mere delivery, neither he, nor his transferee with notice of the want of title of the transferor, can retain it against the true owner, nor sue the acceptor or

Lost or stolen
bank-notes.

Lost or stolen
bills or pro-
missory notes
or negotiable
securities.

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maker. But if he transfers it before maturity to a person who takes it without fraud, the transferee may retain it against the owner, and sue the parties liable thereon. (Ad. Torts, 536; Byles, 389.) **1231**

If a bill or promissory note, payable to bearer, is lost, immediate notice should be given to the parties who are liable on it, and notice should also be given at once to the public by advertisement, to prevent it from getting into the hands of an innocent person for value without notice. But even if the loss is not advertised or made known, still the loser may recover its value from any holder who has taken it under suspicious circumstances. (Byles, 389-91; Ad. Torts, 537.) **1232**

In any action or proceeding upon a bill of exchange or other negotiable instrument, the Court or Judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or Judge against the claims of any other person upon the instrument in question. (45 & 46 Vict. c. 61, s. 70; Byles, 395; Broom, Com. 504.)

1233

Destroyed bill
or note.

The owner of a destroyed bill (whether actually indorsed or not) or note, if negotiable, cannot, at common law, recover against the other parties, or sue on the consideration. But by 45 & 46 Vict. c. 61, s. 69, when a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill, giving security if required. (Byles, 392.) **1234**

Stat. 45 & 46
Vict. c. 61.
General cross-
ing.

The stat. 45 & 46 Vict. c. 61 enacts, "Where a cheque bears across its face an addition of—(a) the words 'and company,' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable'; or (b) two parallel

transverse lines simply, either with or without the words 'not negotiable'; that addition constitutes a crossing, and the cheque is crossed generally" (s. 76 (1)). **1235**

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"Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially and to that banker" (s. 76 (2)). **1236**

Special crossing.

"A cheque may be crossed generally or specially by the drawer" (s. 77 (1)). **1237**

By drawer.

"Where a cheque is uncrossed, the holder may cross it generally or specially" (s. 77 (2)). **1238**

After issue.

"Where a cheque is crossed generally, the holder may cross it specially" (s. 77 (3)). **1239**

"Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable'" (s. 77 (4)). **1240**

"Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection" (s. 77 (5)). **1241**

"Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself" (s. 77 (6)). **1242**

"A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing" (s. 78). **1243**

Crossing material part of cheque.

"Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof" (s. 79 (1)). **1244**

Duties of banker as to crossed cheques.

"Where a cheque is crossed generally, the banker on whom it is drawn must only pay it to a banker; and

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where a cheque is crossed specially, only to the banker to whom it is crossed or his agent. If he so pays it in good faith, and without negligence, he, or, if the cheque has come to the hands of the payee, the drawer will be protected, but where the banker on whom a cheque is drawn pays it otherwise than according to the crossing, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. If, however, the crossing is obliterated or altered, he is not liable when such obliteration or alteration is not apparent" (s. 79 (2)). (Chalm. B. 254-60.) **1245**

Effect of
crossing on
holder.

"Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have, and shall not be capable of giving, a better title to the cheque than the person from whom he took it had" (s. 81). **1246**

Protection to
collecting
banker.

"Where a banker, in good faith and without negligence, receives payment for a customer of a cheque crossed generally, or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque, by reason only of having received such payment" (s. 82). (*La Cave & Co. v. Credit Lyonnais*, (1897) 1 Q. B. 148; *Clarke v. London and County Banking Co.*, (1897) 1 Q. B. 552.) **1247**

Title of holder
of cheque
crossed
generally or
specially.

It would seem that the sections 76-82 do not affect the negotiability of a cheque crossed generally or specially, unless it is marked "not negotiable," so that if a payee indorses a cheque with his own name, and writes across it the name of his bankers, but does not add the words "not negotiable," and the cheque is stolen from him, and comes into the hands of a bona fide holder for value, who pays it into his bank which presents it to the bankers with whose name it is crossed

and they pay it, the payee from whom it is stolen has no remedy against his bankers. (*Smith v. Union Bank of London*, 10 Q. B. 291; 1 Q. B. D. (Ap.) 31.) But if a cheque is marked "not negotiable," it continues to be transferable, but a holder has no better title than his transferor had. (Supra, par. 1246.) **1248**

A cheque should be presented for payment, or, if the parties live at a distance, forwarded for the purpose of being presented for payment, not later than the day after the day on which it is received; and, in the latter case, the person to whom it is forwarded should present it for payment the day after he receives it. But delay will not exonerate the drawer, unless the person on whom it was drawn has failed in the meantime, or there is a loss to the drawer by the delay. (*Byles*, 20-1; 1 Rose. 395.) **1249**

Time for presentation of cheque for payment.

A post-dated cheque is a valid and negotiable instrument, complete and regular on the face of it, so that a person taking such a cheque before its date has, nevertheless, a good title. (*Royal Bank of Scotland v. Tottenham*, (1894) 2 Q. B. 715.) **1250**

Post-dated cheque.

If a customer pays a cheque into a bank, to be placed to his account, the banker must not delay to get the cheque paid, and to give notice to the customer in case of non-payment; otherwise the bank must bear any loss that may arise. (Ad. Con. 781. On this subject, see *Prideaux v. Criddle*, L. R. 4 Q. B. 455.) **1251**

Duty of bankers to get cheques cashed.

Whatever cheques or moneys a customer pays into the bank to his own account must be treated by the banker as the cheques or moneys of the customer alone. The banker cannot set up the right of any third person. (Ad. Con. 783-4.) **1252**

Banker cannot set up jus tertii.

A banker cannot recover the money from the person who has presented a cheque and received payment,

Banker cannot recover from person

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though the drawer may have overdrawn his account. (Byles, 305; *Chambers v. Miller*, 13 C. B. (N. S.) 125.)

1253

to whom
cheque is
paid.

Notice of dis-
honour of a
cheque.

Where a cheque is dishonoured, notice of dishonour must ordinarily be given to the drawer. But this is not necessary, if there were no sufficient effects at the time when the drawer would reasonably expect the cheque to be presented, and the drawer had no reasonable expectation that it would be paid. (*Carew v. Duckworth*, L. R. 4 Ex. 313; *Grant*, 50-1; 45 & 46 Vict. c. 61, s. 50 (2) (c), (4).) **1254**

Cheque on
one branch,
where there is
a balance
while there is
a countervail-
ing debit at
another.

In the absence of a special contract to the contrary, a banker may, even without notice, refuse to honour a cheque at one branch, though the customer has a balance there, if at another branch with which the customer has also an account, there is a countervailing debit, so that the bank, as an entire concern, has not assets of his to meet the cheque (*Garnett v. M'Kewan*, L. R. 8 Ex. 10; for the branches form one bank. (*Prince v. Oriental Bank Corporation*, L. R. 3 App. Cas. 325.) **1255**

Liability of
banker dis-
honouring
cheque.

If a banker dishonour a cheque when he has funds to the credit of the customer sufficient to meet it, he is liable to the customer in damages. (*Grant*, 46.) **1256**

Altering date
of cheque.

If a payee or his transferee, or a third person alters the date of a cheque, whether to an earlier or later date, it invalidates the cheque. (*Vance v. Lowther*, 1 Ex. D. 176; 45 & 46 Vict. c. 61, s. 64.) **1257**

When a bill
or note ceases
to be negoti-
able.

A bill or note ceases to be negotiable: (1) When it is made not negotiable ab initio, or, in the case of a cheque, is crossed "not negotiable"; (2) when it is restrictively indorsed; (3) when it is overdue. (*Chalm. B.* 112-5.) **1258**

*Negotiable Securities other than Bills, Notes, and
Cheques.*

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Bank notes are negotiable. A bank note is in effect a promissory note issued by a banker payable to bearer on demand. (*Miller v. Race*, 1 Sm. L. C. 447.) **1259**

Bank post bills are negotiable. (*Faber v. Marshall*, 24 L. J. Ex. 305.) **1260**

Foreign government bonds to bearer are negotiable. In *Gorgier v. Mieville* (3 B. & C. 45), Prussian government bonds payable to bearer were wrongfully pledged by the plaintiff's agent. On proof that these bonds were treated as negotiable in the London money market, it was held that the plaintiff could not recover them from the pledgee, who had acted in good faith. (See also *London & County Bank v. River Plate Bank*, 21 Q. B. D. 535.) But a foreign government and its agents cannot be sued on its engagements (*Twycross v. Dreyfus*, 5 Ch. D. 605); and sometimes instruments negotiable abroad are not negotiable in England. Thus, in *Picker v. London & County Bank* (18 Q. B. D. 515), Prussian bonds, without the coupons attached, were held not negotiable in England, as there was no evidence that they were so treated in the English money market, although treated as negotiable in Prussia. **1261**

Scrip to bearer for Russian government bonds was held to be negotiable in *Goodwin v. Roberts* (L. R. 10 Ex. 76; Ex. Ch. 337; 1 App. Cas. 476). Scrip certifies to bearer for shares in an English joint stock company were held to be negotiable in *Rumball v. Metropolitan Bank* (1 Q. B. D. 194). (Chalm. B. 324.) **1262**

Railway bonds payable to bearer were held to be

Railway
bearer bonds.

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negotiable in *Venables v. Baring Brothers* ((1892) 3 Ch. 527). **1263**

Circular
notes.

Circular notes are negotiable. (*Conflaus Quarry Co. v. Parker*, L. R. 3 C. P. 1; Chalm. B. 318.) **1264**

Foreign
corporation
bonds.

Foreign corporation bonds payable to bearer are (it appears) negotiable. (*London Joint Stock Bank v. Simmons*, (1892) A. C. 201—a case of Cédulas or Argentine Bank bonds; cp. *Bentinck v. London Joint Stock Bank*, (1893) 2 Ch. 120.) **1265**

Debentures.

Debentures, if in substance promissory notes within the definitions of 45 & 46 Vict. c. 61, s. 83, are now negotiable, though under seal (sect. 91, sub-s. 2). (See *Crouch v. Credit Foncier of England*, L. R. 8 Q. B. 374; *Re Romford Canal Co.*, 24 Ch. D. 85; Chalm. B. 318-22.) **1266**

Dividend
warrants.

Dividend warrants are negotiable. (Chalm. B. 322.) **1267**

Exchequer
bills.

Exchequer bills are negotiable instruments. (*Wookey v. Pole*, 4 B. & Ald. 1; Chalm. B. 322-3.) **1268**

Instruments
not negoti-
able.

The following instruments have been held not to be negotiable:—

- (1) Post Office Orders. (*Fine Art Society v. Union Bank*, 17 Q. B. D. 705; cp. *McEntire v. Potter & Co.*, 22 Q. B. D. at p. 442.)
- (2) Share certificates and transfers. (*London & County Bank v. River Plate Bank*, 20 Q. B. D. 232; *Williams v. Colonial Bank*, 38 Ch. D. 388; *Colonial Bank v. Cady*, 15 App. Cas. 267.)
- (3) An I O U, or mere acknowledgment of a debt, is not a negotiable instrument. (Chalm. B. 264; *Gould v. Coombs*, 1 C. B. 543.)
- (4) Documents representing chattels are not negotiable. Thus, a promise in writing to deliver

1,000 tons of iron to bearer was held not to be negotiable. (*Dixon v. Bovill*, 3 Macq. 1.) But such a contract may be made assignable free from equities. (*Merchant Banking Co. of London v. Phoenix Bessemer Steel Co*, 5 Ch. D. 205.) Though bills of lading and other documents relating to chattels are not negotiable, the indorsement over by the buyer to a bonâ fide purchaser will defeat the seller's right of stoppage in transitu in the event of the buyer's insolvency. (Sale of Goods Act, 1893, s. 47.) **1269**

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In certain cases an instrument not otherwise negotiable may, by its form, create an estoppel, and thereby prevent the original holder recovering from a bonâ fide transferee, or setting up equities against him. (*Ex parte Asiatic Banking Corporation*, 2 Ch. 391.) But an estoppel must consist in some express or implied representation. (*Goodwin v. Roberts*, 1 App. Cas. 476; *Colonial Bank v. Cady*, 15 App. Cas. at p. 282; and see *Baxendale v. Bennett*, 3 Q. B. D. 525; *Ingham v. Primrose*, 7 C. B. (N. S.) 82; *Byles*, 254-5.) **1270**

CHAPTER XII.

DEBTORS AND CREDITORS GENERALLY.

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A DEBT is a sum due. **1271**

Debt defined.
Division of
debts.

Debts, when classified according to the mode in which they are evidenced, are of three kinds: judgment debts, specialty debts, and simple contract debts. (2 Ste. Com. 146.) **1272**

Judgment
debt.

A judgment debt is a sum payable under a judgment, decree, order or rule, either made by a superior Court of Common Law or of Equity, or having the same effect as if so made. (2 Ste. Com. 146.) **1273**

Elegit.

It is enacted by the Statute of Westminster 2, 13 Edw. I. c. 18, that when a debt is recovered or acknowledged, or damages adjudged in the King's Courts, the plaintiff shall have his election either to have a writ of fieri facias, or else that the sheriff shall deliver to him all the chattels of the debtor (saving only his oxen and beasts of the plough), and also one half of his lands, until the debts shall be levied upon a reasonable price or extent: the word "price" referring to the chattels, and the word "extent" to the lands. In consequence of this statute, a writ was framed, under which the sheriff first caused the goods and chattels to be appraised by a jury; and if they were insufficient to pay the debt, then the jury put an annual value on the land, and the sheriff delivered the goods and chattels and a moiety of the land to the creditor under the old law, or the whole under the statute 1 & 2 Vict. c. 110, s. 11. This writ was called a writ of elegit, because the creditor thereby

elected to sue out execution against the land, instead of proceeding at common law against the goods alone by writ of fieri facias. **1274**

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By the stat. 46 & 47 Vict. c. 52, s. 146, it is provided that, "the sheriff shall not, under a writ of elegit, deliver the goods of a debtor, nor shall a writ of elegit extend to goods." **1275**

Under the stat. 1 & 2 Vict. c. 110, s. 13, a judgment was made a charge upon all the real estate of the debtor, but a judgment was not to affect a purchaser, mortgagee, or creditor unless registered in accordance with the Act. **1276**

Operation of
a judgment
as a charge in
Equity.

By the stat. 23 & 24 Vict. c. 38, s. 1, however, no judgment, statute, or recognisance entered up after the 23rd of July, 1860, was to affect any land, as to a bonâ fide purchaser for valuable consideration, or a mortgagee, even with notice, unless a writ or other due process of execution was issued and registered before the execution of the conveyance or mortgage, and the payment of the purchase or mortgage money, and put in force within three calendar months from the time when it was registered. **1276a**

And by the stat. 27 & 28 Vict. c. 112, no judgment, statute, or recognisance, to be entered up after the 29th day of July, 1864, will affect any land (of whatever tenure), unless such land shall have been actually delivered in execution, by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute, or recognisance (s. 1). **1277**

By 51 & 52 Vict. c. 5, s. 6, no such writ or other process shall bind the lands in the hands of a purchaser for value unless it has been duly registered at the Land Registry Office. **1278**

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71),

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s. 26, a writ of fieri facias, or other writ of execution against goods, binds the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; but no such writ shall prejudice the title to such goods acquired by any person in good faith for valuable consideration, unless such person had notice at the time when he acquired his title that a writ had been delivered to the sheriff.

1279

Specialty
debt.

A specialty debt is a debt resulting from an instrument sealed and delivered. **1280**

A specialty debt had priority over a simple contract debt in the payment of a testator's or intestate's debts, except in bankruptcy. But this priority is abolished by the stat. 32 & 33 Vict. c. 46. **1281**

Simple
contract debt.

A simple contract debt is a debt not secured by deed nor evidenced by record. **1282**

Contract of
debt.

A contract of debt is one whereby a definite sum of money becomes due to any person. (Sm. Merc. Law, 665.) **1283**

Division of
accounts.

Accounts are divisible into open, stated, and settled accounts. **1284**

Open
accounts.

An open account is an account of which the balance is not struck, or which is not accepted by both parties.

1285

Stated
accounts.

A stated account is one that is accepted by both parties; and any admission made by the defendant of some definite balance being due from him to the plaintiff will be evidence of an account stated, and raise an implied promise to pay over the amount. **1286**

Where
interest is
payable.

The general rule at Common Law is that the law does not imply a contract to pay interest, even on money lent. **1287**

Interest may be demanded, not only where there is an

express stipulation for it, written or verbal, but also where it is payable by the usage of trade or of the parties, or in the case of an overdue bond, bill, or promissory note, or an account stated for money lent. And the jury may allow interest to the creditor, on any debt or sum certain from the time when the same was payable, if payable from a time certain under a written instrument, or if payable otherwise, from the time of a written demand, with notice that interest would be claimed. Interest at 4 per cent. is payable on a judgment debt. (Sm. Merc. Law, 676-7; 1 Rose. 593-7; Byles, 440-4; Chit. Con. 544-7; 3 & 4 Will. IV. c. 42, s. 28; 1 & 2 Vict. c. 110, s. 17; 45 & 46 Vict. c. 61, ss. 9, 57; 56 & 57 Vict. c. 71, s. 54; *London, Chatham and Dover Rail. Co. v. South Eastern Rail. Co.*, (1893) A. C. 429.) **1288**

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Interest ceases to run after a tender of the principal. (1 Rose. 593.) **1289**

When interest ceases.

On obtaining judgment for a principal sum, upon which interest at a fixed rate was payable, the interest ceases to accrue, but the judgment carries interest at 4l. per cent. upon the judgment debt itself and arrears of interest. (*Ex parte Fewings*, 25 Ch. D. (Ap.) 338.) **1290**

Compound interest is interest upon interest, i.e., interest on a balance of account in which the debtor is debited with former interest. This is allowable in some mercantile cases, where it is expressly stipulated, or where there is an implied contract for it; as where the parties had been in the habit of dealing on the footing of allowing it, or where it is the practice of a banking house, of which the customer was aware. (Sm. Merc. Law, 677; 1 Rose. 595; Chit. Con. 545.) **1291**

Compound interest.

The debtor is bound to tender the principal and interest at the proper time, without waiting for a demand. (Chit. Con. 668; 1 Rose. 675-6.) **1292**

Tender.

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Bank of England notes payable to bearer on demand are a legal tender for any sum above 5*l.*, except when the tender is made by the bank itself, or its branches, as the debtor. (3 & 4 Will. IV. c. 98, s. 6.) Country notes or cheques are not a legal tender, if objected to on that ground. Gold coin is legal tender to any amount; silver coin to amount of 40*s.*; bronze coin to amount of 12*d.* (Sm. Merc. Law, 667; 1 Rose. 677; Chit. Con. 672.) **1293**

A conditional tender (as, for instance, a tender of a sum to be accepted "in full of all demands," or as "the balance due") is not a legal tender, that is, not a tender which the creditor is bound to accept. Nor is the tender of a sum exceeding the debt, and requiring change. (Sm. Merc. Law, 667; Chit. Con. 670; 1 Rose. 679; Ad. Con. 153.) **1294**

Payment
through the
post or a
bank.

Sending money in a letter by post, or paying it into a bank, by request of the creditor, is equivalent to payment directly to him. (Ad. Con. 136; Chit. Con. 634; *Pennington v. Crossley*, 13 T. L. R. 573; see above, par. 621*a.*) **1295**

Payment by
bill or note.

When a creditor accepts a bill or note in payment, he thereby virtually agrees to give the debtor credit for the time which it has to run, except in the case of rent or specialty debts, or unless the debtor knew the bill or note to be of no value. In general, it is no satisfaction of the debt or demand, until it is paid, unless the creditor agrees to accept it as cash, or has been guilty of laches in enforcing payment. (Sm. Merc. Law, 671-2; Byles, 373-4, 377; 1 Rose. 666-7; Chit. Con. 647-8; Ad. Con. 137-40; *Davis v. Reilly*, (1898) 1 Q. B. 3.) **1296**

Payment by
cheque.

If a creditor takes a cheque in payment of his debt, other than a bill or note, and it is dishonoured, or the banker fails, the creditor's remedies for the recovery of

the debt are unaffected, if he has presented it in due time. (Byles, 21, 24-5 ; see supra, par. 1249.) **1297**

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Payment to one of two or more executors, trustees, joint creditors, and, in general, partners, is sufficient. (Chit. Con. 630-1.) **1298**

Payment to
one executor,
trustee, or
joint creditor

The taking from the debtor himself, and not from a third person, with the debtor's assent, a smaller sum of money in lieu and full discharge of a greater ascertained sum, does not amount to a legal satisfaction, unless the time, place or manner of payment of the less amount may by possibility be more advantageous to the creditor, or there is some other consideration to save the transaction from being a nudum pactum, or unless the acknowledgment of satisfaction is by deed. So that although a man may give, in satisfaction of a debt of 100*l.*, a horse worth 5*l.*, yet if he gives 5*l.* it is not a satisfaction. But the acceptance of a negotiable security for a less amount, e.g., a cheque payable on demand, will be a satisfaction. (3 Ste. Com. 284; Chit. Con. 632, 644-5 ; 1 Rose. 631 ; Ad. Con. 169-71; Byles, 309-10; *Foakes v. Beer*, 9 App. Cas. 605; *Goddard v. O'Brien*, 9 Q. B. D. 37; *Bidder v. Bridges*, 37 Ch. D. 406; *Underwood v. Underwood*, (1894) P. 204.) **1299**

Satisfaction.

The payment of money will sometimes be presumed, from lapse of time and other circumstances, independently of the Statute of Limitations. (Chit. Con. 632-3.) **1300**

Presumption
of payment.

Although a receipt was given, the debtor may prove payment by oral testimony ; or the creditor may prove that in reality no payment was made. (Chit. Con. 641; Ad. Con. 142.) **1301**

Proof of pay-
ment or non-
payment.

Receipts for 2*l.* and upwards now require a penny Receipts.

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stamp, and no more. If any person gives a receipt subject to duty not fully stamped, he shall incur a fine of 10*l*. (1 Rose. 265; Chit. Con. 641-2; Stamp Act, 1891, 54 & 55 Vict. 39.) **1302**

The debtor is bound to provide the paper and writing materials, and the stamp, if necessary, for the receipt. (Ad. Con. 153-4.) But the creditor is bound to pay him for the stamp. **1303**

Appropriation of payments.

Where a creditor has two debts due to him from the same debtor on distinct accounts, the general law as to the appropriation of payments made by the debtor is this: the debtor is entitled to apply the payments, at the time of making them, in such manner as he thinks fit. In default of appropriation by the debtor, whether evidenced (as it may be) by his previous conduct, or subsequent declarations, or by other circumstances, the creditor is entitled to determine the application of the sums paid. And if neither does so, the law implies an appropriation of such payments to the earlier debt. And where separate matters are treated as one entire account by all parties, the payment is deemed to be made in discharge of the earlier items of debt. But this presumption may be rebutted by circumstances. (Story's Eq. Jur. § 459a, 459g; 1 Rose. 664-6; Ad. Con. 148-51; *Clayton's Case*, 1 Mer. 572; *Knatchbull v. Hallett*, 13 Ch. D. 696; *Hancock v. Smith*, 41 Ch. D. 456; *The Mecca*, (1897) A. C. 286.) **1304**

Frauds on creditors, parties to composition deed.

If a debtor induces a creditor to execute a deed of composition, by a gift, or by misrepresentation or concealment of the state of his affairs, the deed is void. And any secret agreement for securing to one of the creditors who are parties to a composition deed, any advantage not enjoyed by the rest, is fraudulent and void. (Ad. Con. 82; *Atkinson v. Denby*, 7 H. & N. 934;

Daughlish v. Tennent, L. R. 2 Q. B. 49; *Ex parte Milner*, 15 Q. B. D. 605.) **1305**

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An action lies for making a false representation of the character and solvency of another, whereby the plaintiff was induced to give credit to him, and has thereby suffered loss, if such representation was fraudulent, and not made *bonâ fide* under a belief of its truth. But no action can be brought to charge any person, by reason of any representation or assurance as to the character, conduct, credit, ability, trade, or dealing of any other person, that he may obtain credit, money, or goods, unless it is in writing, signed by the party to be charged therewith, and not by his agent. (*Chit. Con.* 587; 2 *Rosc.* 854; 9 *Geo. IV. c. 14, s. 6*; *Swift v. Jewsbury*, L. R. 9 Q. B. (Ex. Ch.) 301.) **1306**

Lord Ten-
terden's Act,
as to repre-
sentations or
assurances.

One ground of defence either total or partial, is set-off or counter-claim. A defendant in an action may set off or set up by way of counter-claim, against the claim of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof. (*Rules of the Supreme Court, 1883, Ord. XIX. r. 3.*) It is not *necessary* that the claim of the defendant be connected with that of the plaintiff. The power of set-off is not limited to debts. Claims for unliquidated damages may be set-off. And the amount of the set-off

Set-off or
counter-
claim.

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or counter-claim may be either greater or less than the amount of the plaintiff's claim. But a set-off or counter-claim can only be made of a matter which would form a cause of action, and in respect of which an action would not have been restrained in Equity. (Chit. Con. 698-702; Annual Practice, R. S. C. Ord. XIX. r. 3.) **1307**

Release.

A debt may be released either by the express act of the creditor, or by operation of law. No particular form of words is necessary to constitute a release. Thus, an unqualified covenant not to sue, is a release. (1 Rose. 670; Chit. Con. 652.) Before breach a contract may be released by parol; but after breach the release must be under seal. (1 Rose. 669.) **1308**

If the release is under seal, no consideration need be shown. If it is not under seal, it will be inoperative without a consideration, though it is in writing, and though the creditor accepts part of the debt expressly in full of all demands. (Chit. Con. 652; Ad. Con. 158.) **1309**

A person cannot release all future causes of action that may arise. (Chit. Con. 654; Ad. Con. 159.) **1310**

A release by operation of law took place in various cases: as where a creditor appointed his debtor to be his executor, and the debtor acted, and yet of course could not sue himself; but in Equity he was regarded as a trustee of the assets, including the debt, for the benefit of the persons interested in the estate. (Chit. Con. 656; Ad. Con. 237.) **1311**

A release of a debt or of a claim to damages by one joint creditor is in law a release by both or all. (Chit. Con. 654.) **1312**

An unqualified release of one of two or more joint or

joint and several debtors or contractors is a discharge of both or all. (1 Rose. 669; Chit. Con. 655; Ad. Con. 159.) **1313**

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Money paid under mistake of fact can be recovered back, but not if paid under compulsion of legal process. Money paid under a mistake of law cannot be recovered back, unless paid to an officer of the Court, e.g., to a trustee in bankruptcy. **1314**

Money paid
under
mistake.

If a person voluntarily pays a debt barred by the Statute of Limitations, he cannot recover it back. (Chit. Con. 83.) **1315**

A guaranty is a promise to be responsible for the payment of a debt or the performance of a duty, in case another person, who is, or is supposed to be, primarily liable to such payment or performance, fails to pay or perform the same. (Wharton; Sm. Merc. Law, 567; 1 Rose. 461; Ad. Con. 994; *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; 7 Q. B. (Ex. Ch.) 196; 7 H. L. 17.) **1316**

Guaranty.

Care must be taken not to treat as a guaranty (which is an actual promise) a mere proposal or offer of a guaranty, acceptance of which requires to be notified to the maker, before it constitutes a binding contract. (Ad. Con. 997.) **1317**

Where A. has induced a tradesman to deliver goods to B., the question frequently arises whether the goods were actually sold to A., though delivered to B., or whether they were sold to B., and A. only became surety for the price. And so where A. has induced a person to do work for B., the question often occurs, whether the work is to be debited to A., though done for B., or whether it was to be debited to B., and A. only became surety for B. And this is to be determined, not simply by a regard to the words of the

One person
inducing a
tradesman to
supply goods
to another
person.

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guaranty, but from the character and situation of the parties, and all the circumstances. Thus the words "I will see you paid;" may mean either, "I will pay you;" or "you shall be paid by the principal debtor, and if he does not pay you, I will be surety for the payment." (1 Rose. 461; Ad. Con. 994; *Mountstephen v. Lakeman*, L. R. 5 Q. B. 613; 7 Q. B. (Ex. Ch.) 196; 7 H. L. 17.) **1318**

Enactments
of the Statute
of Frauds as
to guaranties.

In consequence of the 4th section of the Statute of Frauds, 29 Car. II. c. 3, no action can be brought to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof (including the names of the parties) is in writing, signed by the party to be charged therewith, or some other person lawfully authorized by him. (1 Rose. 461; Ad. Con. 995.) The writing, however, is only necessary by way of proof of the contract, not to constitute it, and does not make a contract valid if it is not so according to the good faith and intention of the parties. (Broom, Com. 373.) And the statute does not apply where an order for goods is given by, and credit given to, one person for the use of another; for the debt in that case is the debt of the person giving the order. The statute only applies to promises to answer for the debt, default, or miscarriage of another, for which that other person himself is liable, whether such promises are made before or after the debt, default, or miscarriage. And hence, if A. says, "Let B. have these articles, and if he do not pay, I will," the statute applies; so that a writing is required. But if A. had said, "Let B. have these articles on my account," or "Let B. have these articles, and charge me with them," no writing would be re-

quired; because B. would not be liable at all, inasmuch as the articles were, in fact, purchased by A., though delivered by his direction to B. (1 Rose. 461; Broom, Com. 380; Ad. Con. 994-5; *Birkmyr v. Darnell*, 1 Sm. L. C. 287.) **1319**

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The statute does not apply to a case where the result of a promise by one person to pay the debt or perform the duty of another, is to extinguish or satisfy the liability of such other person, by substituting the former in his stead; as if A. agree to pay B.'s debt to C., if C. will discharge B. from arrest under a ca. sa. And an agreement by A. that he will pay half of any losses incurred by default of customers introduced by him to B. is a contract of indemnity, and not of suretyship; the main object of such an agreement is to regulate the terms of the employment of A. by B. (1 Rose. 461; Ad. Con. 32; *Sutton v. Grey*, (1894) 1 Q. B. 285; *Guild v. Conrad*, (1894) 2 Q. B. 885.) **1320**

Difference
between in-
demnity and
guarantee.

The statute does not apply to promises not made to the person to whom the original debtor is liable; so that, if made to the debtor or to a third person, the promise need not be in writing. (1 Rose. 461; Broom, Com. 382; Ad. Con. 30.) **1321**

But the statute applies to promises to answer for another's default or miscarriage, though it be a tort unconnected with breach of contract. (Broom, Com. 383; Ad. Con. 29-30.) **1322**

In consequence of the statute 19 & 20 Vict. c. 97, s. 3, it is no longer necessary that the consideration for a guaranty should appear in or by inference from a written document. (Broom, Com. 379; 1 Rose. 461; Ad. Con. 995; *Wain v. Warlters*, 1 Sm. L. C. 310.)

Consideration
for a
guaranty.

1323

But if required by the opposite party, the person

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asserting a claim under a guaranty must show a good legal consideration for it. The antecedent existence of a debt, default, or miscarriage, in respect of which the guaranty is given, does not of itself constitute such a consideration. But it need not be shown that there was an adequate consideration. (Sm. Merc. Law, 575; Ad. Con. 997; Chit. Con. 469.) As to what constitutes a consideration, see above, pars. 485-99. **1324**

It is sometimes doubtful whether a written guaranty is limited or unlimited as to time or amount, or whether a written guaranty to a certain amount is limited to secure that amount on one transaction, or whether it is a continuing guaranty to that amount from time to time. In such cases, parol evidence of the circumstances is admissible to fill up that on which the guaranty is silent, by ascertaining what was the scope and object of the intended guaranty. (Chit. Con. 480; *Coles v. Pack*, L. R. 5 C. P. 65; *Heffield v. Meadows*, L. R. 4 C. P. 595.) **1325**

Extent of
liability.

Where a contract of suretyship is under seal, and the duration of the liability is not limited, the surety has no means of escape from the contingent liability, unless he has reserved to himself such a power; and, therefore, doubtful contracts of suretyship under seal, which the surety has no means of revoking, are construed in favour of the surety, so as to narrow rather than enlarge his liability. But in the case of a surety by simple contract, though of course the surety is liable for all advances or supplies made on the faith of his promise while it remains unrevoked, yet he may at any time revoke such promise and discharge himself from future liability, by giving notice to that effect. (Ad. Con. 999-1000; Chit. Con. 492.) **1326**

In the absence of special agreement a judgment or

an award against a principal debtor is not binding on the surety, and is not evidence against him in an action against him by the creditor, but the surety is entitled to have the liability proved against him in the same way as against the principal debtor. (*Ex parte Young*, 17 Q. B. D. 668.) **1327**

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Entire good faith is required between a debtor, creditor, and sureties. And if the surety or person giving the guaranty is misled, to the knowledge of the person receiving it, by a material misrepresentation or concealment of the terms of the contract, or of circumstances which the creditor ought to have disclosed, the suretyship or guaranty is ineffectual. But the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the obligation. The contract of suretyship differing in this respect from that of insurance, in which all material facts must be disclosed. But a surety is entitled to disclosure of any arrangement that may exist between the debtor and creditor that may make his position different from what he would reasonably expect. (2 Ste. Com. 110; Ad. Con. 1011; Chit. Con. 484; 1 Rose. 465; *Lee v. Jones*, 14 C. B. (N. S.) 386; 17 C. B. (N. S.) 482.) **1328**

Misrepresentation practised on a surety, or concealment of material particulars.

A surety or person giving a guaranty is discharged—
(1) By such concealment or misrepresentation as is above described. (2) If the principal debtor or co-surety is released, by the creditor, unless the surety has expressly agreed that a release of the principal debtor shall not have the effect of discharging the surety; or unless the liability of the surety has accrued, and the remedies against him are reserved. (3) If the debt or demand is otherwise extinguished, as between the principal parties. (4) If the remedy is suspended by a

Discharge of a surety.

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binding contract between them, without the surety's consent. (5) If the loss is attributable to some fault, other than forbearance, on the part of the creditor. (6) If the terms of the original agreement between the creditor and the principal debtor are altered by them without the surety's assent, and in a way that may prejudice him; at least if he entered into the contract with any knowledge of the terms of the original agreement affected by the alteration. In order to discharge the surety by such material alteration, e.g., by giving time to the principal debtor, there must be a binding enforceable contract with the debtor; and if the rights against the surety are expressly reserved the latter is not discharged—for in such a case, if the surety has to pay the debt, he can at once claim to be indemnified by the principal, notwithstanding the agreement to give time made between the creditor and debtor. (7) If the creditor is chargeable with any improper act or omission injurious to the surety, such as loss of securities, to which, on payment, the security is entitled. (8) If the instrument is altered by an intending co-surety. (*Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75.) (9) In the case of a guarantee given to or for a firm, if there is a change in the firm, unless there is a contrary intention shown or implied. (Mercantile Law Amendment Act, 1856, 19 & 20 Vict. c. 97, s. 4; 1 Rose. 463.) (10) In the case of a continuing guaranty, the estate of the surety is not liable thereon for advances made subsequently to his death, if notice of his death is given to the holder of the guaranty. (Ad. Con. 1006-12; 1 Rose. 465-7; *Boaler v. Mayor*, 19 C. B. (N. S.) 76; *Durham (Mayor of) v. Fowler*, 22 Q. B. D. 394; *Clarke v. Bailey*, 41 Ch. D. 422; *Commercial Bank of Tasmania v. Jones*, (1893) A. C. 313.) **1329**

In a recent case where a guarantee had been given by two persons jointly for the payment of rent by another, and a cheque was given by one of the sureties for half-a-year's rent which was in arrear, it was held that a judgment obtained by the creditor, and returned unsatisfied, on the cheque did not discharge the other joint contractor, as the causes of action on the cheque and the guarantee were not the same. (*Wegg-Prosser v. Evans*, (1895) 1 Q. B. 108.) **1330**

A creditor by releasing one of two sureties contracting severally, does not discharge the other, unless the latter can show that his right of contribution is destroyed or injured. (*Ward v. National Bank of New Zealand*, 8 App. Cas. 755.) **1331**

On a continuing guaranty for a person employed, if the employer discovers that the person employed has been guilty of dishonesty or breach of duty, in the course of the service, and, instead of discharging him, continues to employ him, without the surety being aware of the dishonesty or breach of duty, and consenting, expressly or impliedly to the person employed being so retained, the employer cannot afterwards have recourse to the surety in respect of any dishonesty or breach of duty, during the subsequent service. (*Phillips v. Foxall*, L. R. 7 Q. B. 666; *Hull (Mayor of) v. Harding*, (1892) 2 Q. B. 494.) But this would not apply where the person employed has been guilty of irregularity in accounts merely. (*Durham (Mayor of) v. Fowler*, 22 Q. B. D. 394.) **1332**

If a debtor has obtained his discharge in bankruptcy, he is discharged from personal liability to his surety, as well as to the creditor himself. But the creditor may still recover against the surety; and the creditor or the surety (if the surety pay the debt) may prove against

Discharge of
debtor or
surety.

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the debtor's estate under the bankruptcy. The surety is not discharged, because bankruptcy is the act of the law, and this is one of the very things the consequences of which the suretyship was intended, not to be relieved from, but to guard against, and provide for. **1333**

A continuing guaranty is not revoked merely by the death of the surety, but in the absence of express provision to the contrary such a guaranty is revoked as to subsequent advances by notice of the surety's death, except when the guaranty was such, being for a consideration given once for all—e.g., the admission of the guarantor's son to Lloyd's as a life member—that the guarantor could not have revoked it during his life; or where the guaranty provides specially that the obligor or his representatives may determine his liability by a notice to the obligee, and notice is not given in accordance with such provision. (Chit. Con. 492-3; *In re Silvester*, (1895) 1 Ch. 573.) **1334**

Indemnities
of surety.

The principal debtor is bound to reimburse the surety for any payment which he is compelled to make as surety. (2 Ste. Com. 111; Chit. Con. 493; Ad. Con. 1013.) And, indeed, as soon as the principal makes default, the surety may discharge the liability, and compel the principal to reimburse him. (Ad. Con. 1013.) **1335**

Contribution
between
sureties.

If one of two or more sureties, or other joint debtors, not being general partners, pays more than his proportion of the demand, he may, even at Law, compel a contribution from the other or others. (1 Rose. 569; Chit. Con. 493; 2 Ste. Com. 111-12; Ad. Con. 1014-5.) Moreover, this right of contribution may, in certain cases, be available to the surety before actual payment by him, provided a judgment for the amount has been

obtained against him. (*Wolmershausen v. Gullick*, (1893) 2 Ch. 514.) **1336**

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At Law the amount of contribution to which the co-surety was entitled depended on the number of sureties originally liable. So that if there were three sureties for a certain sum, and one of them paid the whole, he could not at Law recover from either of the others more than a third of the sum paid, although at the time he paid it one of his co-sureties was dead or insolvent. But in Equity the surety in the above case would be entitled to recover one-half of the entire sum paid by him from the surviving or solvent co-surety; and now by the Judicature Act, 1873, the rules of Equity prevail in all branches of the High Court.

1337

By the statute 19 & 20 Vict. c. 97, s. 5, "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at Law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor." Before this Act the surety only had a right to collateral securities, and not to the principal security itself. The surety has the right to the creditor's securities, though he did not know of the existence of such securities when he became a surety. (*Duncan, Fox & Co. v. North and South Wales Bank*, 6 App. Cas. 1; *In re Parker, Morgan v. Hill*, (1894) 3 Ch. 400.) **1338**

Right of
surety to the
creditor's
securities.

CHAPTER XIII.

PRINCIPALS AND AGENTS ; LEGAL PRACTITIONERS
AND CLIENTS.

SECTION I.

Nature of the Contract of Agency.

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SECT. I.

AN agent is a person empowered to act in the name of another, who is called his principal, and to put him in legal relations with third parties. **1339**

Agent
defined.

Who may be
agent.

AN infant may be an agent. And a feme covert may be agent, either for her own husband or another person. (1 Sm. Merc. Law, 117 ; Broom, Com. 597 ; 2 Ste. Com. 70, 307 ; Ad. Con. 311 ; Chit. Con. 256.) **1340**

Mode of ap-
pointment.

AN agent may in general be constituted either verbally, or by writing, or by deed, or tacitly by conduct, as by the establishment of a relationship from which agency will be implied by Law, as partnership, or by circumstances from which agency will be inferred. This is termed agency by estoppel. Married women are sometimes the implied agents of their husbands for the purchase of necessities ; and sometimes the express agents of their husbands, appointed by words or conduct. (See above, pars. 573-80.) But an agent for the purposes of the 1st, 2nd, and 3rd sections of the Statute of Frauds, must be appointed in writing. And an agent who is to execute a deed, must be appointed by deed. (1 Sm. Merc. Law, 117 ; Broom, Com. 599, 600, 622 ; 2 Ste. Com. 70.) **1341**

What may be
deputed.

That which a person may do himself as principal, he may (except in one or two cases) appoint an agent to

do for him. But an agent cannot delegate the duties of his agency, the general rule being *delegatus non potest delegare*, unless specially authorized or justified by the usage of trade, except those which are of such a nature that he cannot be expected to perform them personally. (1 Sm. Merc. Law, 116; Broom, Com. 597; Byles, 37, 42; 2 Ste. Com. 73; Chit. Con. 264; *Bell v. Balls*, (1897) 1 Ch. 663.) **1342**

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A sub-agent employed to receive money is in general accountable only to the agent; and the agent is accountable to the principal for the money received by the sub-agent. (1 Rose. 578; Ad. Con. 875.) **1343**

Money received by sub-agent.

But an agent may have authority, express or implied, to appoint a sub-agent, who is accountable to the principal. (*De Bussche v. Alt*, 8 Ch. D. 286.) **1344**

An agent is responsible not only for himself, but for those whom he may employ under him, unless he is authorized to employ others; in which case he will be answerable only for negligence or want of skill in choosing them. (1 Sm. Merc. Law, 120.) **1345**

Responsibility for sub-agent.

If an agent, by the authority of his principal, employs a sub-agent to sell the principal's goods, the principal can only recover the proceeds from the sub-agent, if the latter has received the proceeds believing they belonged to the agent, subject to any set-off available by the sub-agent against the agent. (1 Rose. 578; *New Zealand Land Co. v. Watson*, 7 Q. B. D. 374; *Kaltenbach v. Lewis*, 10 App. Cas. 617.) **1346**

Agencies, as regards their extent, are of three kinds : (1) Special, which are authorities to do a particular act, or carry out a particular matter. (2) General, which are authorities to do everything that is requisite in relation to a particular business or employment.

Different sorts of authorities.

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SECT. I.

(3) Universal, which are authorities to do all acts that the principal may depute another to do. So that a man may have both a special and a general agent, or one general agent in regard to one business, and another general agent in regard to another business. (Broom, Com. 598; 2 Ste. Com. 71-2; Chit. Con. 259.) **1347**

Extent of
agent's au-
thority.

Again, an agent may be limited by certain instructions as to his conduct, or unlimited, leaving his conduct to his own discretion. If limited by instructions, he ought to carry them into effect as fully and exactly as possible, consistently with propriety. If unlimited, he ought to pursue the accustomed course of business, or, if prevented, to give notice to his principal. (1 Sm. Merc. Law, 119.) **1348**

An agent has authority to bind his principal, not only where he is expressly authorized, but in other cases where such authority is to be inferred from the conduct of the employer. As between the principal and third persons, the agent's authority, where not expressly defined, must be measured by the extent of his usual employment. If a person sends his servant with ready money to buy, and he buys upon credit, the master is not chargeable, unless the servant has by the master's order previously bought of the same person upon credit, and the credit has not been distinctly withdrawn by notice to the tradesman or his foreman or manager. (1 Sm. Merc. Law, 136-7; 1 Rose. 532; Chit. Con. 258-64.) If a master has allowed his servant to buy of any person on credit, he must pay for goods wrongfully bought of the same person by the servant; although he may, in some instances, have given the servant money to pay for the goods. (1 Rose. 532; Chit. Con. 260.) If a clerk has been allowed to draw, indorse, or accept notes or bills, he will acquire an implied authority to

bind the master, though the money never come to the master's use. The same principle is applied to all other mercantile transactions, and even though the servant has been dismissed from his employer's service, provided the third parties had no reason to be aware of such dismissal. **1349**

The authority of the agent must be inferred from facts connected with the employment, not from considerations of the utility or propriety of such an authority. (1 Sm. Merc. Law, 138-9; Byles, 38.)

1350

Under ordinary circumstances, agents are authorized to do all that is necessary or usual for effectuating the main intention of the principal in the best manner. (1 Sm. Merc. Law, 141; Broom, Com. 603; Chit. Con. 262; Ad. Con. 307.) **1351**

Although a shopman be authorized by his employer to receive payment for goods in the shop, that would not necessarily involve an authority to receive money for his employer elsewhere. (Broom, Com. 602; Chit. Con. 630.) **1352**

Unless the principal has previously sanctioned such a course, the agent has ordinarily no implied general authority to borrow on behalf of the principal, so as to make him responsible. (Ad. Con. 310; *Brocklesby v. Temperance Permanent Building Society*, (1895) A. C. 173.) **1353**

It is sometimes said that if a particular agent exceeds his authority, and the opposite party is not aware of it, the agent is personally liable, but his principal is not bound; whereas, if a general agent exceeds his authority, or violates the orders given him, his principal is bound, provided his acts are within the usual dealing and scope of the business. But it would seem that in

Exceeding
authority.



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reality there is no difference in this respect between a special and a general agent. In both cases the principal is bound if the agent is acting within the apparent scope of his authority ; but, of course, in the case of a general agent (as, for example, a person whose profession it is to be an agent, such as a broker or factor), his apparent authority is wider than that of a special agent. As between the principal and agent, however, the authority of an agent depends upon his instructions and the custom of business, and here the distinction between general and special agents is of more importance. (Story on Agency, § 57 ; 1 Sm. Merc. Law, 136-7, 140 ; Ad. Con. 307-12 ; 2 Ste. Com. 72 ; Broom, Com. 601-3 ; Chit. Con. 259-61.) Thus, if the servant or agent of a private individual, intrusted on one occasion to sell a horse, takes upon himself, without authority from his master, to warrant the soundness of the animal, the master is not bound, for this is not within the apparent scope of his authority. But if the servant of a horse-dealer, or even one who occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant. (*Howard v. Sheward*, L. R. 2 C. P. 148.) **1354**

If an agent knowingly exceeds his authority, he is liable to third parties dealing with him in ignorance of his want of authority (Chit. Con. 274) ; but any benefit will belong to his employer. (1 Sm. Merc. Law, 120.) **1355**

Misapprehending
order.

If a principal gives an order to an agent in such ambiguous terms as to be susceptible of two different meanings, and the agent *bonâ fide* adopts one of them, and acts upon it, the principal cannot repudiate the act as unauthorized, because he meant the order to be read in

the other sense. The principal must bear the loss arising from his own indistinctness of expression. (*Ireland v. Livingston*, L. R. 5 H. L. 395, 416.) **1356**

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SECTION II.

Rights and Duties as between Principal and Agent.

It is the duty of an agent to keep clear and regular accounts and vouchers, and to communicate the result to his principal from time to time; and if he does not, he will not be allowed the compensation which would otherwise belong to his agency. And if he mixes up his principal's property with his own, he is put to the necessity of showing clearly what part of the property belongs to him; and so far as he is unable to do this, it is treated, both at Law and in Equity, as the property of the principal. (1 Sm. Merc. Law, 122-4.) **1357**

SECT. II.
Accounts.

An agent is accountable to his principal for any secret profit he may make in the course of or in connection with his agency. (*Morison v. Thompson*, L. R. 9 Q. B. 480; *De Bussche v. Alt*, 8 Ch. D. 286.) If a bribe is given or promised to an agent by a person who has contracted, or is about to contract with the principal, with a view to induce the agent to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one, and not enforceable at law, whatever the actual effect produced in the mind of the person bribed may be. (*Harrington v. Victoria Graving Dock Co.*, 3 Q. B. D. 549.) If the contract is disadvantageous to the principal, he may recover from the agent the amount of the bribe, and from the agent and the person who has paid the bribe, damages for any loss he

Secret profits.

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SECT. II.

may have sustained. (Broom, Com. 353; *Mayor of Salford v. Lever*, (1891) 1 Q. B. 168.) **1358**

An agent employed to buy is not allowed to act as a principal selling for himself; and a custom in a particular market allowing an agent to so act as principal is an unreasonable one, and not binding on a principal who has no knowledge of it. (*Robinson v. Mollett*, L. R. 7 H. L. 802.) **1359**

Directors, and even promoters, of companies, although the latter can hardly be termed agents of the company, are, on the same principle, liable to the company for secret profits they may make in connection with the carrying on, or promotion of, the company. **1360**

But although an agent is to some extent, as the above instances show, in a fiduciary position towards his principal, the agent is the principal's debtor, and not his trustee, in respect of money received as a bribe, or otherwise as a secret profit; and such money, therefore, cannot be followed into the hands of third parties, even if they knew the money to have been improperly received by the agent; nor can the agent be restrained from dealing with the property in which he may have invested such money. (*Lister v. Stubbs*, 45 Ch. D. 1.) **1361**

An agent is estopped from denying the title of his principal in the subject matter of the agency. **1362**

Distinctions
as to remun-
erated and un-
remunerated
agents.

A remunerated agent may be compelled to fulfil his engagement; an unremunerated agent cannot; but if he begins to act, and is guilty of misconduct, he will be liable. A remunerated agent is liable for the consequences of his want of skill: an unremunerated agent is only bound to use that skill which he possesses. A remunerated agent is bound to act with reasonable diligence: an unremunerated agent is only answerable

for gross negligence, unless he act in a public or professional character, in which case he will be assumed to possess skill, his omission to use which constitutes gross negligence. (1 Sm. Merc. Law, 129-30.) **1363**

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SECT. II.

The agent's remuneration is called his commission. Commission.
The amount is fixed by the contract, or by usage, or statute; or if not so fixed, it may be determined by a jury. He may be deprived of his commission by neglecting to keep an account, or by other gross misconduct or negligence, or by gross unskilfulness, or by selling to himself or to a company in which he is a shareholder that which he is intrusted to sell. (1 Sm. Merc. Law, 130-1; Ad. Con. 876; Chit. Con. 517-9; Story on Agency, § 326, 331-4; *Salomons v. Pender*, 3 H. & C. 639.) **1364**

From a contract to employ for a time certain on commission may be implied a contract to give opportunity for earning the commission throughout the time. Thus, where a shirt manufacturer agreed to employ a traveller for five years to obtain orders on commission, it was held that the manufacturer was not excused from fulfilling his agreement by the destruction of his manufactory by fire. (*Turner v. Goldsmith*, (1891) 1 Q. B. 544; cp. *Rhodes v. Forwood*, 1 App. Cas. 256.) **1365**

If instructions are given to several house or estate agents to sell or let a house or estate, the successful agent is alone entitled to commission, unless the others have been instructed to advertise or render some particular service, for which they are entitled to remuneration by the custom of the trade. (Ad. Con. 879.) **1366**

An authority to sell or let may be revoked, so as to deprive the agent of his commission; but he is entitled to remuneration for any trouble or expense properly

PART II. incurred by him. (Ad. Con. 879; 1 Rose. 563.)
 TIT. II. **1367**
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 SECT. II.

Duty of house
agents.

Every house agent is under an implied undertaking to make all proper inquiries as to the respectability and solvency of any one whom he introduces as a tenant. (Ad. Con. 873.) **1368**

Advances by
agent.

An agent may charge his principal with all advances which he has made in the regular course of trade, or in some pressing emergency. (1 Sm. Merc. Law, 133; Story on Agency, § 335-6.) **1369**

Indemnity.

The principal is bound to indemnify his agent against all losses, damages, and expenses incurred in properly executing his office. (1 Sm. Merc. Law, 134-5; Story on Agency, § 339-40; Ad. Con. 885.) **1370**

If a principal direct his agent to engage in any trade or business in a particular market, he is bound by the rules which regulate dealings therein, and must indemnify his agent for all he does in accordance with them. Thus a broker who has been employed to buy or sell shares on the Stock Exchange will be entitled to be indemnified in respect of payments which he has made in accordance with the rules and usages of the Stock Exchange. (*Hartas v. Ribbons*, 22 Q. B. D. 254.) But if the usage is illegal, the principal is not bound by it, if he be not aware of it. Thus a principal was held not bound by a custom on the Stock Exchange to disregard Leeman's Act (30 & 31 Vict. c 29), which enacts that a contract for sale of bank shares which does not specify their number is void, and that it is a misdemeanour on the part of the broker to make such contract. (*Perry v. Barnet*, 15 Q. B. D. 388.) If, however, a principal had actual knowledge of the usage, he will be bound by it. (*Seymour v. Bridge*, 14 Q. B. D. 460.) **1371**

SECTION III.

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SECT. III.

Rights and Duties as between Principal and Third Parties.

An agent who executes a deed may either sign his principal's name, or express that it is executed by himself as agent for his principal, or by his principal, through him the agent. But if he simply signs his own name, his principal will not be bound. (1 Sm. Merc. Law, 143; Broom, Com. 622; Paley, 180-2; Ad. Con. 324, 331.) **1372**

Authority of
an agent.
Execution of
a deed.

An agent may be specially appointed, or by some general or implied authority empowered to draw, indorse, or accept negotiable instruments; and in such cases the principal is said to draw, indorse, or accept by procuration. Authorities to draw, indorse, or accept bills are construed strictly. An agent so acting should not merely sign his own name; for if he does, he will himself be liable to the holder. It should be expressed that the act is done by the principal, through the medium of the agent: as where the agent A. signs thus—"A. for B.," or "B. by A.,"; or, "by procuration of A.," or "B. per procuration, A." (1 Sm. Merc. Law, 143; Byles, 37-40; 1 Rosc. 348, 356; *Stagg v. Elliott*, 12 C. B. (N. S.) 373; *Edmunds v. Bushell*, L. R. 1 Q. B. 97.) **1373**

Drawing, in-
dorsing, or
accepting bills
or notes.

The words per procuration denote a limited authority, into the extent of which the person who takes the bill is bound to inquire. (1 Rosc. 347; Byles, 41; 45 & 46 Vict. c. 61, s. 25.) **1374**

At common law it was held that an agent, authorized to sell goods, could not, although the apparent owner thereof by permission of his principal, pledge them, by delivering to a pawnee either the goods themselves, or

Sales and
pledges by an
agent.

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the documents of title relating thereto. In modern times this state of the law came to be regarded as working great hardship, and various Acts were passed to alter the common law rule. (4 Geo. II. c. 83; 6 Geo. IV. c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39.) These statutes have been repealed, and the present law is contained in the Factors Act, 1889 (52 & 53 Vict. c. 45), which now deals with the whole subject. By this Act it is provided that where a mercantile agent (who is defined in the Act as "one having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods"), is, with the owner's consent, in possession of goods or documents of title thereto, any sale, pledge, or other disposition made by him, when acting in the ordinary course of a mercantile agent's business, shall be as valid as if made with the owner's express authority, although the owner's consent may since have been determined; provided that the person taking acts in good faith, and without notice of the want of authority, or that the consent has been determined. (Sect. 2; *Biggs v. Evans*, (1894) 1 Q. B. 88.)

1375

Two qualifications are appended in the Factors Act, 1889, to the power of the mercantile agent to sell or pledge. A pledgee to whom goods have been pledged as security for a debt or liability due before the time of the pledge acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge; and if the consideration for the pledge is the delivery or transfer of other goods, documents of title, or negotiable securities, the pledgee acquires no right or interest in the goods pledged in excess of the

value of the goods, documents, or securities so delivered or transferred. (Sects. 4-5; 1 Sm. Merc. Law, 144-8; Chit. Con. 265-7.) **1376**

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A jeweller's assistant, employed at a small salary to sell goods retail on commission, is not within the definition of a "mercantile agent." (*Hastings v. Pearson*, (1893) 1 Q. B. 62.) **1377**

Notice to the agent, if in the same transaction, is notice to the principal; and notice to the principal, generally speaking, is notice to the agent. And the agent's representation binds the principal; and his admission, in the matter of the contract, is evidence against the principal. (Sm. Merc. Law, 152-3; 1 Rose. 69; Byles, 143.) **1378**

Notice to agent or to principal.
Agent's representation or admission.

And where an agent buys, on behalf of his principal, goods from a factor, with a knowledge that the goods are not the goods of the factor, such knowledge on the part of the agent of the buyer, however acquired, is the knowledge of the buyer, and therefore the buyer cannot set off against the price a debt due to him from the factor. (*Dresser v. Norwood*, 14 C. B. (N. S.) 466.) **1379**

Set-off.

Where an agent, having a proper authority, purchases or sells in the name of his principal, the principal is bound to the seller or buyer. If, however, the seller expressly, or by conduct, agrees to accept the agent as his debtor instead of the principal, he cannot afterwards alter his election, and turn round and charge the principal. (1 Sm. Merc. Law, 148-9; *Paterson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 574.) **1380**

Agent acting in name of principal.

If an agent purchase in his own name without disclosing that he has any principal, or if he states himself to be an agent, but omits to state the name of

Undisclosed principal.

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his principal, the third party can, if he afterwards discover the undisclosed principal, elect to sue him. (*Thompson v. Davenport*, 9 B. & C. 78; *Watteau v. Fenwick*, (1893) 1 Q. B. 346.) **1381**

The liability of the undisclosed principal is subject to this qualification, that if the principal has paid his agent all (or part) of the money, being induced by the conduct of the third party to believe that the agent and the third party have come to a settlement, although, in fact, they have not done so, the third party cannot sue the principal to make him pay all (or part) over again. (*Irvine v. Watson*, 5 Q. B. D. 102; 1 Sm. Merc. Law, 149-50.) **1382**

Foreign
merchant

As a rule, where the principal is a foreign merchant, and the agent is an English merchant, the third party will be presumed, in the absence of proof to the contrary, to have given credit to the agent. (1 Sm. Merc. Law, 151.) **1383**

Payment,
tender, or
delivery to
an agent.

Payment, tender, or delivery to an agent, in the usual course of his employment, is payment, tender, or delivery to the principal. Thus, payment to a person found in a merchant's counting-house, and in possession of the merchant's books, and apparently authorized to receive money for him, is payment to the merchant himself, though in reality such person was not in the merchant's employment. And payment to the solicitor of a plaintiff in an action is equivalent to payment to the plaintiff himself. But payment to an agent employed to sell an estate is not payment to the vendor, unless the agent is expressly authorized to receive the purchase-money. And the fraudulent or wrongful receipt of an agent *may* not be deemed to be the receipt of the principal. Nor will payment to an agent in general bind the principal, unless it is in

money. (1 Rose. 662-3; 1 Sm. Merc. Law, 154-6; Ad. Con. 136-7; Chit. Con. 629-30; 44 & 45 Vict. c. 41, s. 56; 56 & 57 Vict. c. 53, s. 17.) **1384**

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A principal is not answerable for the wilful and malicious tort of his agent. But he is answerable for the agent's negligence or for those acts which, if not fraudulent or wrongful, would have been within the scope of the agent's ordinary authority; for it is more reasonable that where one of two innocent persons must suffer, the principal, who employed the deceiver or wrong-doer, should suffer, rather than the deceived or injured, who neither directly nor indirectly occasioned the loss. And the same principles apply to companies and their agents. And the principal is answerable whenever he has sanctioned the agent's fraud or wrong, or elected to take the benefit of it. (2 Rose. 849, 852; Broom, Com. 623; 1 Sm. Merc. Law, 156-8; Ad. Con. 112; *Barwick v. Eng. Joint Stock Bank*, L. R. 2 Ex. (Ex. Ch.) 259; *Mackay v. Commercial Bank of New Brunswick*, L. R. 5 P. C. 394, 410-2; *Thorne v. Heard*, (1895) A. C. 495.) **1385**

Responsibility
for agent's
acts or
neglect.

The agent's power is in general determinable: 1. By the revocation of the principal; but an authority coupled with an interest, or given for valuable consideration, as in the case of a power of attorney given by way of security, is not revocable. Hence, too, before the Gaming Act, 1892 (55 Vict. c. 9), if a betting agent lost bets made on behalf of his principal, the latter could not revoke his authority to pay the money to the winners. (*Read v. Anderson*, 13 Q. B. D. 779; see above, pars. 519-20.) In order to determine the agent's authority by revocation, means should be used to make known such revocation as completely as the employment was known. Notice should be given in the *Gazette* to strangers, and

Determina-
tion of agent's
authority.

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to customers and correspondents by direct communication. 2. By the agent's renunciation of it, with the consent of the principal. 3. By the principal's death, even though the authority is coupled with an interest, and even though the death of the principal is unknown to the third parties or to the agent. (*Smout v. Ilbery*, 10 M. & W. 1; *Blades v. Free*, 9 B. & C. 167) (a). 4. By his bankruptcy, except in certain cases. 5. By the fulfilment of his commission. 6. By the expiration of the time limited for the duration of the agency. (1 Sm. Merc. Law, 159-63; 2 Ste. Com. 71; Ad. Con. 865-6; Chit. Con. 256; *Rhodes v. Forwood*, 1 App. Cas. 256.) **1386**

Transactions by the agent, before the date of the receiving order in the principal's bankruptcy, with persons dealing with him for valuable consideration without notice of the principal's act of bankruptcy, are as valid as if the agent's authority were not revoked. **1387**

How far the insanity of the principal will determine the contract of agency seems not yet well settled. (*Drew v. Nunn*, 4 Q. B. D. 661.) **1388**

Ratification
of the act of
an agent.

An act professedly done for another person, though without any precedent authority from him, becomes his act, if subsequently ratified by him. (Broom, Com. 800-6; Ad. Con. 311; Chit. Con. 264-5; 2 Ste. Con. 72.) **1389**

Essentials for
ratification.

The following points in connection with ratification should be noted: 1. The person ratifying must ratify the whole of the contract; he cannot ratify that part only which is beneficial to himself, and reject the remainder. 2. The act to be ratified must not be void or ultra vires. (*Ashbury Railway Carriage Co. v. Riche*, L. R. 7 H. L. 653.) 3. There can be no ratification of an indictable offence. 4. The principal must be ascertained, existent

(a) But see 56 & 57 Vict. c. 53, s. 10, as to trustees, executors, and administrators.

and capable of contracting at the time when the act to be ratified was performed. Hence, a company cannot ratify a contract entered into by promoters before its formation (*Kelner v. Barber*, L. R. 2 C. P. 174), though it may enter into a new contract which has an effect similar to that of ratification. (See above, par. 877.)

5. The act must be performed by a person professing to be agent for the principal who ratifies. 6. The ratification must be made with full knowledge of the circumstances. (*Marsh v. Joseph*, (1897) 1 Ch. 213.)

7. An estate once vested cannot be divested, and an act lawful when performed cannot be made illegal by the act of ratification. (*Bolton Partners v. Lambert*, 41 Ch. D. 295; *Lyell v. Kennedy*, 14 App. Cas. 462.)

8. A bare act, not a contract, the effect of which is to raise a duty towards a principal from a third party, cannot be ratified; thus a notice to quit given by an unauthorised agent cannot be made valid by subsequent ratification. (*Mann v. Warlters*, 10 B. & C. 626.)

9. Ratification once given is irrevocable. 10. The ratification relates back to the time when the contract was made, or the act done, and is binding on third parties, although they may have repudiated the contract before ratification. (*McLean v. Dunn*, 4 Bing. 722; *Bolton Partners v. Lambert*, 41 Ch. D. 295; *Re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16; *Dibbins v. Dibbins*, (1896) 2 Ch. 348.) **1390**

If an agent, acting for an undisclosed principal, makes a contract in his own name, the principal may sue upon it, unless the contract is under seal, or unless the agent really contracts as principal, e.g., when he describes himself in a charter party as "owner."

(1 Sm. Merc. Law, 165.) **1391**

If the undisclosed principal sues upon contracts made Set-off.

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by the agent in his own name, he sues subject to any right of set off the third party may have against the agent. (*George v. Clayett*, 2 Sm. L. C. 135.) But if at any time in the course of the transaction the third party knew, or had means of knowing, that the person with whom he dealt was an agent, he cannot set off. (*Cooke v. Eshelby*, 13 App. Cas. 271; *Borries v. Imperial Ottoman Bank*, L. R. 9 C. P. 38; *Montagu v. Forward*, (1893) 2 Q. B. 350.) **1392**

SECTION IV.

Rights and Duties as between Agent and Third Parties.

SECT. IV.
Agent's
liability.

Where
principal and
agent may
sue and be
sued.

Agents (except masters of ships) professedly contracting, as such, for known and responsible employers, and brokers entering into contracts, as such, though they do not disclose the names of their principals, incur no personal liability to third parties, except for losses incurred by their own fault or negligence, unless it appears to have been intended that the agent should be personally responsible; or unless by the custom of the trade, the agent (as in the case of a broker in the London fruit trade) is personally responsible. But if an agent contracts, without professing to act as an agent, the opposite party may, in most cases, at his option, charge either the agent or the principal on discovering him. And the rule appears to be the same, where, at the time of contracting, he states himself to be an agent, but does not disclose his principal. (1 Sm. Merc. Law, 172-3; 1 Rose. 92; Broom, Com. 607-14; 2 Ste. Com. 73; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Hutchinson v. Tatham*, L. R. 8 C. P. 482; *Armstrong*

v. Stokes, L. R. 7 Q. B. 598; *Irvine v. Watson*, 5 Q. B. D. 102; *ibid.* (Ap.) 414; *Davison v. Donaldson*, 9 Q. B. D. 623; *Pike v. Ongley*, 18 Q. B. D. 708.)

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SECT. IV.

The agent is sometimes personally liable even when the principal is disclosed:—1. When the principal named has no existence at the time, as in the case of a company not yet formed. (*Kelner v. Baxter*, L. R. 2 C. P. 174.) 2. When the principal is incapable. 3. When the agent has expressly undertaken to be personally liable. 4. When a British agent contracts for a foreign principal. 5. When the contract is by deed, and the agent executes it in his own name. 6. When the agent exceeds his apparent authority. **1393**

Persons who induce others to act upon the supposition that they (the former) have authority to enter into a binding contract on behalf of third persons, may be sued for damages for the breach of an implied warranty of authority, on it turning out that they have no such authority, although they may have been innocent of any intention to defraud. An action for breach of warranty of authority is in tort for misrepresentation, not on the contract. The measure of damages in such action depends on the credit of the alleged principal. (*Collen v. Wright*, 7 E. & B. 301; *Polhill v. Walter*, 3 B. & Ad. 114.) **1394**

Breach of
warranty of
authority.

If any agent notoriously acts in a public capacity, and it is obvious that the opposite party must have relied on the good faith of the government, or other irresponsible employers, the agent will not be personally liable. (Ad. Con. 328-30; *Dunn v. MacDonald*, (1897) 1 Q. B. 555.) **1395**

Agent acting
in a public
capacity.

In a recent case, where a shipbroker signed a charter party in the form "by telegraphic authority as agent" of the charterer, and there was a mistake, made by the

Authority by
telegraph.

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officials in transmission of the telegram, as to the rate of freight offered by the charterer, it was held that the shipbroker was not liable for breach of warranty of authority. (*Lilly v. Smales*, (1892) 1 Q. B. 456.)

1396

Where the contract is in writing, the question whether a party entered into it as principal or agent, and his consequent rights and liabilities, depend upon the terms of the contract and the intention to be ascertained therefrom. (Broom, Com. 618-9; Chit. Con. 271-2.)

1397

When agent
can sue.

A servant or agent cannot sue upon a contract entered into by him as such, unless he has some beneficial interest in respect of commission or otherwise, or some special property or interest, as in the case of a factor, carrier, warehouseman, auctioneer, or other agent, having a right of remuneration, growing out of the business. If, however, an agent lends money or enters into any other contract in his own name, but in reality for an undisclosed principal, and the contract is not under seal, there, in general, either principal or agent may sue upon it. But if it is under seal, or by bill of exchange or promissory note, the agent alone can sue upon it. Yet the power of the agent to sue is subservient to the right of the principal: so that if the principal has required or obtained a completion of the contract with himself personally, the agent's right ceases. (1 Sm. Merc. Law, 170-2; 2 Ste. Com. 73; Ad. Con. 303-5; 1 Rose. 92-3; Chit. Con. 277.) **1398**

If a person enter into a contract, professing to be an agent for a third person who is named, when he is really the principal, he cannot sue on the contract, unless it was part performed with knowledge that he was the principal; but he cannot sue if the other

party relied on the name of the alleged principal.
(*Schmalz v. Avery*, 16 Q. B. 331.) **1399**

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SECTION V.

Different Classes of Agents.

Factors are mercantile agents who are intrusted with the possession and disposal of property. Brokers are mercantile agents who are employed to enter into contracts respecting property without being in possession of such property. Both of them are general agents. (1 Sm. Merc. Law, 118; 2 Ste. Com. 83; Chit. Con. 252-3, 261. As to brokers, see *Fowler v. Hollins*, L. R. 7 Q. B. (Ex. Ch.) 616; affirmed 7 H. L. 757.)

SECT. V.

Difference
between
factors and
brokers.

1400

A broker cannot ordinarily sue in his own name upon contracts made by him as broker, but this rule may be modified by custom. (1 Sm. Merc. Law, 171; *Fairlie v. Fenton*, L. R. 5 Ex. 169.) **1401**

It is the duty of a factor to keep the goods with the same care with which a prudent man would keep his own; and it is often, if not usually, his duty to insure them, or if unable to insure, to give notice of his inability to his principal. (1 Sm. Merc. Law, 125-6; Story on Agency, § 111; Paley, 15-6.) **1402**

Duty of a
factor.

If no price is fixed for the goods, the factor must sell them for their fair value. He may sell for credit, or not, according to the usual course of business. If he gives reasonable credit, where it is usual, to a person of good credit, he is discharged, and will be entitled to his commission, notwithstanding any subsequent insolvency of the purchaser; provided he informs his prin-

Price.
Credit.

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SECT. V.

cipal of the transaction within a reasonable and usual time. (1 Sm. Merc. Law, 127; Paley, 26-7; Ad. Con. 868.) **1403**

Del credere.

Sometimes, however, the factor sells under a commission called *del credere*, from an Italian mercantile phrase signifying guarantee, by which the factor, for an additional premium, warrants, and makes himself responsible for the solvency of the purchaser. But his engagement to be responsible need not be in writing under the Statute of Frauds (29 Car. II. c. 3), s. 4. (*Couturier v. Hastie*, 8 Exch. 40.) It is a promise of indemnity to his employer against his own inadvertence or ill-fortune in making contracts for him with persons who cannot, or will not, perform them. (1 Sm. Merc. Law, 127; 2 Ste. Com. 83; Ad. Con. 32, 869; Chit. Con. 253; Anson, 346.) **1404**

Auctioneer.

An auctioneer is a person authorized to sell goods or merchandize at a public auction or sale for a recompense, commonly termed commission. (Story on Agency, § 27.) **1405**

How far
auctioneer or
broker the
agent of both
parties.

An auctioneer is usually the agent of both parties after the acceptance of the bid, and until the deposit is paid, and, as such, he may sign the contract, so as to bind both parties, and receive the deposit. (Broom, Com. 414-5.) **1406**

The auctioneer's clerk has no authority to sign a contract of sale by the general custom; but there may be special circumstances to show that the clerk had such authority. Thus, where the bidder, as the person to be charged, authorizes by word or sign the clerk to sign on his behalf, he makes the clerk his agent for signing, though by the general custom the clerk would not be the bidder's agent, but only the agent of his employer, the auctioneer. (Blackburn, J., in *Peirce v. Corf*, L. R.

9 Q. B. 210, 215; *Sims v. Landray*, (1894) 2 Ch. 318; *Bell v. Balls*, (1897) 1 Ch. 663.) **1407**

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SECT. V.

A broker is the agent of both parties in this respect, that his signature of the contract binds both seller and buyer; and he usually binds them by making and signing an entry of the contract in his book; and he transmits to them copies of this entry, which are called bought and sold notes; the bought note being transmitted to the buyer, and the sold note to the seller. (Ad. Con. 493; *Thompson v. Gardiner*, 1 C. P. D. 777.)

1408

An auctioneer is not bound to pay over the proceeds of sale to the person who employed him, when he has received notice from a third person, and the fact is, that the goods did not belong to the person who employed him, but to such third person. (*Biddle v. Bond*, 6 B. & S. 225.) **1409**

Sale of goods
belonging to a
third person.

If money is deposited in the hands of a stakeholder to wait the result of a lawful game, the stakeholder holds the money as agent of the winner. **1410**

Stakeholders
and deposit.

If an auctioneer has received a deposit from the purchaser of an estate, to be paid over to the vendor if a good title to the property is made out by the latter, and, in default, to be returned to the intending purchaser, the purchaser has no right to demand back the deposit, and the auctioneer is not justified in returning it without the consent of the vendor. But if the vendor is not able to establish his title, or the contract is rescinded or abandoned by the mutual consent of the parties, the auctioneer holds the deposit for the use and at the disposal of the party from whom he received it, and is bound to return it at his request. (Ad. Con. 776.) If, however, the solicitor of the vendor receive a deposit solely as agent for the vendor, he must pay it

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over to him on demand. (*Edgell v. Day*, L. R. 1 C. P. 80; *Ellis v. Goulton*, (1893) 1 Q. B. 350.) **1411**

If the deposit is made to abide the event of a wager or to carry into effect an unlawful transaction, the depositor may, at any time before the event has happened, or before the deposit has been paid over, demand it back, and maintain an action for its recovery. (*Hampden v. Walsh*, 1 Q. B. D. 189; *Strachan v. Universal Stock Exchange* (No. 1), (1896) A. C. 166; (No. 2), (1895) 2 Q. B. 697.) **1412**

Rules of law
as to
solicitors.

It is the duty of a solicitor to keep his client's secrets, and not to disclose the contents of any of his title deeds; and to warn his client not to enter into covenants and stipulations where they are attended with unusual liability; and to conduct his client's business with a reasonable degree of care, skill, and despatch. And if he is guilty of gross default, negligence, or ignorance, he is liable to an action by his client. (Ad. Con. 816-20; 1 Rose. 490-1; Pulling, 148; Chit. Con. 534-7.) **1413**

Where any doubt or question arises as to the interpretation and legal operation of assurances, a solicitor may take the opinion of counsel upon them for his protection. If, instead of doing this, he relies upon his own judgment respecting them, and makes mistakes, he will be answerable in damages. (Ad. Con. 819; 1 Rose. 490; Pulling, 423.) **1414**

A solicitor is liable for the mistakes or negligence of his agent, where he would have been liable had he himself been guilty of them. (Chit. Con. 537; Ad. Con. 816.) **1415**

A solicitor cannot recover his charges for business done by him in that character unless he had a certificate to practise during the period within which the work

was done. (6 & 7 Vict. c. 73, s. 26 ; Chit. Con. 533 ; *Re Jones*, L. R. 9 Eq. 63.) **1416**

By stat. 33 & 34 Vict. c. 28, solicitors may make arrangements in writing as to their remuneration for contentious business ; and by stat. 44 & 45 Vict. c. 44, they may make agreements in writing as to their remuneration in conveyancing and other non-contentious matters. Such an agreement may provide that the solicitor shall be remunerated by a gross sum, or a percentage, or a salary ; but if such agreement is objected to by the client as unreasonable and unfair, the taxing master may inquire into it, and certify to the Court, who can then cancel the agreement. In default of special agreement, the solicitor's charges must, if the business be non-contentious, conform to the scale laid down in the Solicitors' Remuneration Order, made under the Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44 ; Chit. Con. 533.) **1417**

No action can be brought by a solicitor for the recovery of any fees, charges, or disbursements, until the expiration of one month after the delivery of a bill, signed and sent in in accordance with the Solicitors Act, 1843, to the party to be charged. (6 & 7 Vict. c. 73, s. 37 ; Chit. Con. 533-4.) **1418**

A solicitor may lawfully take from his client a security upon property, which is the subject-matter of an action, for advances already made, and costs already due, in the action ; and by 33 & 34 Vict. c. 28, s. 10, he can take security from his client for costs to be incurred. (Chit. Con. 577-8.) **1419**

But an agreement by which a solicitor, retained to prosecute any suit or action, stipulates for payment only in the event of success in such suit or action, is void. (33 & 34 Vict. c. 28, s. 11 ; Chit. Con. 578.) **1420**

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SECT. V.

A solicitor has a general lien on the papers of the client. (Chit. Con. 508; *Re Llewellyn*, (1891) 3 Ch. 145.) **1421**

By 23 & 24 Vict. c. 127, s. 28, the Court or a judge before whom any action, matter, or other proceeding has been heard, has power to order the solicitor's costs to be made a charge on property recovered or preserved by the acts of the solicitor, and to make an order for raising and payment thereof out of such property. **1422**

A solicitor is not entitled without good cause, or giving reasonable notice to his client, to decline to act further in the action for him, and thereupon sue for his costs. (*Underwood, Son & Piper v. Lewis*, (1894) 2 Q. B. 306.) The refusal of the client to provide the necessary funds for disbursements would be good cause for discontinuance. (Chit. Con. 537.) **1423**

Rules of law
as to counsel.

A barrister cannot contract for his fees, and has no legal remedy for the recovery of them. On the other hand, he cannot be sued for negligence, mistake, or unskilfulness. (Chit. Con. 509-11; *Kennedy v. Brown*, 13 C. B. (N. S.) 677.) **1424**

An advocate of the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, expressed or implied. (*Swinfen v. Lord Chelmsford*, 5 H. & N. 890.) **1425**

Counsel is not liable to any action for any act that he does in good faith in the conduct of a suit, even for entering into a compromise; or for any words spoken by him in the conduct of the suit. (*Swinfen v. Lord Chelmsford*, 5 H. & N. 890; *Munster v. Lamb*, 11 Q. B. D. 588.) **1426**

CHAPTER XIV.

EMPLOYERS AND EMPLOYED ; INCLUDING MASTERS,
SERVANTS, WORKMEN, APPRENTICES, AND OTHERS.

A CONTRACT of hiring and service need not be created or evidenced by writing, unless it is for more than a year. (Ad. Con. 843.) **1427**

PART II.
TIT. II.
CHAP. XIV.

The term servant legally applies not only to menial servants, but to other persons employed for hire in a person's domestic establishment, or in his business ; such as tutors, governesses, and clerks. **1428**

Legal import
of the term
servant.

A hiring at reasonable wages may be presumed from the very fact of service, where it is customary to pay them, except in the case of near relatives. (Ad. Con. 843.) **1429**

Hiring, when
presumed.

If no time is limited for the duration of the service, either expressly or by implication, the hiring is a general one, and is ordinarily deemed to be for a year certain, unless there are circumstances which give rise to a different presumption ; and if the service continues beyond the first or any subsequent year, a contract for a second or further year is implied. Where the hiring is for a year, and so from year to year so long as the parties please, not determinable by custom or agreement, a reasonable notice on either side is necessary to determine it, expiring at the end of the current year of the service. A quarter's notice is sufficient in all cases ; but in many cases, a month's notice is enough. (See references below, par. 1432.) **1430**

Duration of
service, and
notice re-
quired to
determine it.

PART II.
TIT. II.
CHAP. XIV.

Where an agreement is entered into to act as agent "for twelve months certain, after which time either party shall be at liberty to terminate the agreement by giving to the other a three months' notice," there at the close of the twelve months, the agreement can be determined by either party without any notice; and the stipulation as to a three months' notice only applies in case of the engagement being prolonged beyond twelve months. (*Langton v. Carleton*, L. R. 9 Ex. 57.) **1431**

Whether verbally or in writing, a general hiring of menial or domestic servants, i. e., a hiring without any engagement as to the duration of the service, but at a yearly sum, is a hiring for a year, and so on from year to year, dissoluble by a month's warning (*a*) on either side, or payment by the master, or forfeiture or payment by the servant, of a month's wages. Quarterly, monthly, or weekly wages are, however, not inconsistent with a yearly hiring, but may be merely a mode of payment. But in the absence of indications to the contrary, a general hiring at monthly or weekly wages is but a hiring for a month or a week, and so on from month to month, or from week to week. (Sm. Merc. Law, 520-1; 2 Ste. Com. 235; Chit. Con. 524; Ad. Con. 844-7; *Nicoll v. Greaves*, 17 C. B. (N. S.) 27, 34.) **1432**

The existence of a custom to terminate the hiring of a domestic servant by notice given on either side at or before the expiration of the first fortnight is not a notorious custom, and must be proved by evidence in each particular case. (*Moult v. Halliday*, (1898) 1 Q. B. 125.) **1432a**

It would seem that the indefinite engagement of a governess or a clerk is an engagement for a year, but

(*a*) This would seem to be a calendar month, if the wages are paid for a calendar month.

determinable by three months' notice. (Pollock, C. B., in *Fairman v. Oakford*, 5 H. & N. 635.) **1433**

PART II.
TIT. II.
CHAP. XIV.

Unless there is an express or implied stipulation to the contrary, there is an implied condition in contracts for personal services that the death of either party shall dissolve the contract. (*Farrow v. Wilson*, L. R. 4 C. P. 744.) **1434**

A master is liable for the torts of his servants when committed in the course of their employment. At common law he was not responsible for an injury happening to one of his servants, in consequence of the negligence of another, provided the servants were engaged in one common employment; but the law on this point has been altered to a considerable extent by the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37). (See above, Part I. Tit. I. Chap. III.) **1435**

Responsibility
of an employer
for the acts or
negligence of
the person
employed.

A servant may decline to do that from which he has reason to apprehend bodily injury. (Ad. Con. 848.) **1436**

Refusal of
servant to
expose himself
to injury.

A person who undertakes any duty, employment, or trust, is under an implied contract to act with all reasonable care, diligence, and ability, and in accordance with instructions given and assented to, and, in the absence of any agreement as to price, for a reasonable pecuniary remuneration. If he does not, he is responsible to his employer for damages. And it may be stated to be a rule applicable to employers and employed generally, that if there has been no beneficial service, owing to the gross fault of the person employed, he is entitled to no pay; and if his work has been productive of injury rather than benefit, he is liable to an action. (Ad. Con. 854-5.) **1437**

Legal conse-
quences of
want of care,
knowledge, or
skill on the
part of the
persons
employed.

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CHAP. XIV.

In the absence of special covenant, a clerk or servant, who has left or been discharged, cannot be restrained from soliciting or doing business with the customers of his former employer; but it is an implied term of every contract of service that the servant will not use to the detriment of the master information acquired in course of and by reason of the service. Hence if, while in the employer's service, he make a list of customers and use it after he has left to solicit orders from them, he will be liable to pay damages, and will be restrained from using the list. (Chit. Con. 532; *Robb v. Green*, (1895) 2 Q. B. 315; *Louis v. Smellie*, 73 L. T. 226, C. A.) **1438**

Discharge.

A servant may be discharged for the following causes:—1. Wilful disobedience of a lawful order. 2. Gross moral misconduct. 3. Habitual negligence, or conduct calculated seriously to injure his master's business, or unlawfully absenting himself from his work to any serious extent, or refusal to do it, or other conduct which might be prejudicial to his master. 4. Incompetence, or permanent disability from illness. And, on the above grounds of misconduct, the master may discharge him without warning, and without assigning any specific act of misconduct, if any existed, as the cause of dismissal: and he need only pay the wages accrued due at or before the time of the dismissal, and not wages calculated pro rata up to the time of the dismissal, though not then due. (2 Ste. Com. 240; Chit. Con. 527-8; Ad. Con. 855-6.) **1439**

Right to
wages on
dismissal or
quitting
service.

If a domestic is temporarily disabled by sickness or other accident, this does not justify the master in discharging him without such warning or wages as he might otherwise claim. (2 Ste. Com. 239; Chit. Con. 529; Ad. Con. 856-7.) **1440**

A servant hired generally, and dismissed without

cause, has a right to damages for the loss he has sustained in consequence of the dismissal, and his inability to obtain another equally eligible situation. And, on the other hand, if a servant quits his master without cause before the end of the period when he would be entitled to a payment, he thereby forfeits all right to wages for the broken period. (Macdonell, 191-6; 1 Rosc. 499; Ad. Con. 857; Chit. Con. 528.)

1441

Some servants and workmen may be summoned before justices of the peace for neglecting or refusing to fulfil their contracts, and may, on that account, be discharged without wages, and committed to gaol. And disputes as to non-payment of their wages are to be determined by justices of the peace. (See 2 Ste. Com. 237-8.)

1442

A master is not bound to provide his servant with medicine or medical attendance. But if a master gets medical aid for his servant, while under his roof, the master is liable; and he cannot deduct the expense from the servant's wages, unless it was so agreed. (2 Ste. Com. 239; Ad. Con. 848, 858; Chit. Con. 530-1.)

1443

A master is not bound to give his servant any character at all. If, however, he gives a character, it ought, of course, to be a true one. Yet if he gives a bad character untruly, he will not be liable; except in some cases where he gives it without being applied to; or unless there is proof of malice; as where it is proved to have been contrary to his knowledge or belief. (2 Ste. Com. 241; Broom, Com. 848-9; 2 Rosc. 871.)

1444

A master ought, in answer to inquiries, to give information of misconduct of which a servant has been

PART II.
TIT. II.
CHAP. XIV.

Servants or
workmen
neglecting or
refusing to
work.
Disputes
about wages.

Medical relief.

Giving a
character.

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CHAP. XIV.

guilty after having left his service, and such information is privileged. And if a master gives a good character, he ought to communicate to the person to whom such character was given any subsequently discovered circumstances which show that it was not deserved. (*Macdonell*, 183; 2 *Rosc.* 871; *Gardner v. Slade*, 13 Q. B. 796.) **1445**

Enticing
away a
servant, or
keeping him
from his
master.

A person who knowingly induces a servant to leave his master's service, or keeps him as servant after he has quitted his place, and before the expiration of the stipulated period of service, is liable to an action. (*Ad. Torts*, 585; *Macdonell*, 229, 231; *Broom*, Com. 970; *Lumley v. Gye*, 2 E. & B. 216; *Bowen v. Hall*, 6 Q. B. D. 333.) And a person may bring an action for enticing away his child, as his servant, even though it be only for a few days, and though the service rendered by the child may have been only at the will of both parties. (*Evans v. Walton*, L. R. 2 C. P. 615.) **1446**

Enticing
away a child.

If a workman is dismissed from his employment at the instigation of a delegate of a trade union, he has no cause of action against the delegate unless a breach of contract was thereby caused. (*Allen v. Flood*, 32 L. J. 619.) **1447**

Action for
injury to a
servant.

A master may sue for the seduction of, or any personal injury to, his servant, if he thereby loses the servant's services. (*Broom*, Com. 969; *Macdonell*, 228, 230; 2 *Rosc.* 909.) But it has been held (extraordinarily, as the writer submits) that he cannot so sue if the injury produces immediate death. (*Osborn v. Gillett*, L. R. 8 Ex. 88; *Midland Insurance Co. v. Smith*, 6 Q. B. D. 561.) **1448**

Employing
another
person's task
workman.

A workman by the job or piece is the servant of the person who contracted with him, until the work is finished; and whilst the work is in progress no other

person may employ him, so as to cause it to be unfinished. (Ad. Torts, 586.) **1449**

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CHAP. XIV.

The sum agreed to be paid for any work may be reduced, by showing that the work or materials were of an inferior quality to what they ought to have been; or the claim may be entirely resisted, by showing that the work will not answer the intended purpose. (Ad. Con. 808; Macdonell, 157.) **1450**

Payment
reduced
resisted.

A person may refuse the services of another whom he has agreed to employ, if such other person does not commence his work on the day named. But he cannot refuse to pay such person on account of his having failed to complete it by the appointed time; though he may sue him for any damage thereby sustained. (Ad. Con. 801-2; Macdonell, 209.) **1451**

Non-com-
mencement
or non-com-
pletion in
time.

The contract of apprenticeship is a contract whereby one person, as master, engages to instruct another as his apprentice; and whereby the latter becomes bound to devote his whole time and services, during a limited period, for the benefit of his instructor, and frequently also to pay him a sum of money. (Sm. Merc. Law, 561; Ad. Con. 860.) **1452**

Contract of
apprentice-
ship.

A writing is necessary to constitute an apprenticeship; and indeed it is now usually effected by deed, containing covenants by the master and apprentice, or by some one on behalf of the apprentice, for the due discharge of the duties of the master and apprentice towards each other. **1453**

An infant may bind himself; but he may avoid the agreement, even while under age, if it is clearly for his interest to do so. Therefore, his friends ordinarily become bound for his faithful service and good conduct during the apprenticeship, and are liable to make good whatever damage is sustained by the master if the

Rights of
master and
apprentice.

PART II.
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CHAP. XIV.

infant repudiates the contract on coming of age. (Ad. Con. 861.) But infants are usually bound apprentices by their parents with their consent; and pauper children are bound by the guardians of the poor, and are called parish apprentices. **1454**

A covenant in an apprenticeship deed to pay a premium is enforceable if the deed as a whole was a proper arrangement for the infant, the premium reasonable, and instruction given in accordance with the deed. (*Walter v. Everard*, (1891) 2 Q. B. 369.) **1455**

If an apprenticeship deed contains stipulations which are not for the benefit of the infant apprentice, the whole deed is invalid. (*Corn v. Matthews*, (1893) 1 Q. B. 310.) **1456**

No action will lie against an apprentice upon any of the covenants in the deed of apprenticeship, except where the apprenticeship is in the City of London. But in case of any disobedience to the master's lawful orders, or of negligence or immorality, the master may administer to him, if an infant, moderate and reasonable corporal chastisement, such as a father may inflict upon his child, or a schoolmaster upon his pupil; and he may also bring him before justices of the peace, who may punish him; or he may maintain an action, in case of gross misconduct, against any adult who has covenanted for his good behaviour. On the other hand, the master is bound to minister to the apprentice's necessities in health and sickness; providing him with food, medicine, and medical attendance. And the master may be sued, or, in a gross case, indicted, for ill-usage or neglect of the apprentice. (Ad. Con. 861; Chit. Con. 177, 530; Macdonell, 90.) **1457**

There are various ways in which an apprenticeship may be dissolved. Thus, 1. It may be determined by

It
an termina-
pers of
work n-ice-

consent of the parties in case the apprentice is under age, and the dissolution is for his advantage. 2. By the election of an apprentice at his full age. 3. By the master's bankruptcy. 4. By the death of the master or apprentice. 5. By the interposition of justices, upon certain grounds, on the complaint of the master or of the apprentice. (1 Sm. Merc. Law, 564-5; Ad. Con. 862-3.) **1458**

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CHAP. XIV.

By the consent of all parties, a transfer may be made of the services of the apprentice to another master. (Sm. Merc. Law, 565.) **1459**

Transfer of
services.

If either the master or the apprentice dies at any time during the term of the apprenticeship, it has been held that no action for a return of the premium or any part of it will lie, unless there is a stipulation in the deed providing for it. (*Whincup v. Hughes*, L. R. 6 C. P. 78. In this case the master died at the end of the first of the six years.) **1460**

Death of
master or
apprentice.

If an apprentice is an habitual thief, it is a good defence to an action against the master for dismissing him, and there is no necessity for the master to return any premium which may have been paid. (*Learoyd v. Brook*, (1891) 1 Q. B. 431.) **1461**

CHAPTER XV.

THE CONTRACT OF MARRIAGE.

PART II.
TIT. II.
CHAP. XV.

I. Contract to
marry.

I. A CONTRACT to marry must be reciprocal, and must be obligatory upon both parties, except that an infant may sue, though incapable of being sued, on such a contract. (Chit. Con. 497-8.) **1462**

Such a contract may be evidenced by a verbal promise, or even by unequivocal conduct alone. (Ad. Con. 1196; Chit. Con. 498.) **1463**

An action may be maintained on a contract to marry, in case of default at the time specified, or in case of an absolute refusal being made before the time, or, if no time was specified, within a reasonable time after request; and a large pecuniary compensation may be recovered for the misery occasioned to the disappointed party. (Ad. Con. 1198; *Frost v. Knight*, L. R. 7 Ex. (Ex. Ch.) 111.) **1464**

Fraud used by the plaintiff in procuring the promise, e.g., false representation or fraudulent concealment as to the pecuniary circumstances or previous life of the plaintiff, or a secret disposition of the plaintiff's property, or the impotence or the bad character of the plaintiff subsequently discovered, or the subsequent bad conduct of the plaintiff towards the defendant, are good grounds of defence to an action for breach of promise of marriage. (Ad. Con. 1198-200; Chit. Con. 500-2.) But if the plaintiff is sane at the time of the promise, it has been held that it is no answer to an action for

breach of it, that he or she was before of unsound mind, and as such, legally confined in a lunatic asylum.

(*Baker v. Cartwright*, 10 C. B. (N. S.) 124.) Also the fact that the defendant was married at the time the promise of marriage was made and consequently is incapable of performing it, is no defence to an action for breach of it, unless the plaintiff knew of the fact when the promise was accepted. (Ad. Con. 1198.) Nor is the fact that at the time of the defendant's promise of marriage, the plaintiff was engaged to be married to another, and concealed this from the defendant, unless the concealment was fraudulent. (Chit. Con. 500.)

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CHAP. XV.

1465

II. There are certain requisites to a marriage contract, without which it may be set aside as null and void. **1466**

II. Requisites to marriages.

Thus: 1. Corporal capacity is necessary. The impotency, or corporal incapacity of one party, at the time of the marriage, is a ground for avoiding it by the other party. (Chit. Con. 503.) **1467**

1. Corporal capacity.

2. The man must not have another wife, or the wife another husband, living at the time. (2 Ste. Com. 248.) **1468**

2. Unmarried.

3. If either party is under the age of seven years, the marriage is void. If the husband is above seven and under fourteen years of age, or the wife is above seven and under twelve, the marriage is not absolutely void; but the husband on attaining the age of fourteen, or the wife, on attaining the age of twelve, and not before, may disagree to and avoid it; but if at that age they agree to continue together, they need not be married again. No promise to marry made by a person under the age of twenty-one years, is binding upon such a person, though a promise to marry by the

3. Sufficient age.

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CHAP. XV.

4. Sound
mind.

opposite party will bind him or her if of age. (2 Ste. Com. 251-2; Ad. Con. 1203.) **1469**

4. Soundness of mind is necessary; the marriage of an idiot or lunatic, except during a lucid interval, is void. (Chit. Con. 503; *Lord Durham's Case*, 10 P. D. 80.) **1470**

5. Not within
the prohibited
degrees of
consanguinity
or affinity.

5. Marriages since the 31st of August, 1835, within the prohibited degrees of consanguinity or affinity, are also void. (2 Ste. Com. 249; Ad. Con. 1204.) **1471**

III. Modes of
proceeding
towards cele-
bration of
marriage.

III. It is necessary to the validity of the contract of marriage in England that there should be a public ceremony, either according to the rites of the Church of England by a priest in a parish church, or in a chapel registered for marriages; or, as to Nonconformists, at a registered building in the presence of the registrar, or by the registrar alone at his office. (Chit. Con. 503.) There are also certain statutory formalities as to the publication of banns, obtaining of a licence, and so forth, a wilful and knowing disobedience of which will annul the marriage. (Chit. Con. 503-4.) **1472**

IV. Decree
declaratory
of validity of
marriage,
legitimacy,
&c.

IV. The Divorce Division of the High Court may, on petition of a natural-born subject of the Queen, domiciled in England or Ireland, or claiming any real or personal estate situate in England, make a decree declaratory of the validity or invalidity of the marriage of such person, or of his father and mother, or of his grandfather and grandmother, or of his legitimacy or illegitimacy, or of his right to be deemed a natural-born subject of the Queen. (21 & 22 Vict. c. 93, ss. 1, 2.) **1473**

V. Suits for
jactitation of
marriage.

V. When marriages were allowed to be celebrated in a more clandestine manner, suits for jactitation of marriage, that is, for boasting of being married, to a person, contrary to the fact, were of frequent occur-

rence; but they are now seldom heard of, though they may still be instituted. (*Thompson v. Rourke*, (1892) P. 244.) **1474**

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CHAP. XV.

VI. Before the new Divorce Act, there were two kinds of divorce by the Ecclesiastical Court: first, a divorce a vinculo matrimonii, whereby the marriage was declared null, as having been absolutely unlawful ab initio, and the issue, if any, became bastardised, and the parties were enabled to contract another marriage; second, a divorce a mensa et thoro, whereby they were merely separated, without annulling the marriage. **1475**

VI. Divorce
before the
new Divorce
Act.

Divorce a vinculo matrimonii could not be obtained from the Ecclesiastical Court for any post-nuptial cause, but was often granted on the ground of adultery, by a private Act of Parliament. (2 Ste. Com. 283-5.) **1476**

By the stat. 20 & 21 Vict. c. 85, the jurisdiction of the Ecclesiastical Courts was transferred to the Court for Divorce and Matrimonial Causes, now included in a Division of the High Court of Justice. **1477**

The new
Divorce Act.

This Court may, on the petition of either husband or wife, decree a judicial separation, in lieu, and having the effect, of the divorce a mensa et thoro. (Sects. 7, 16.) Such judicial separation may be decreed on the ground of adultery, or cruelty, or desertion without cause for two years and upwards. The Court may also grant a divorce or dissolution of marriage, corresponding with the old divorce a vinculo matrimonii, on the petition of the husband, upon the ground of the post-nuptial adultery of the wife; or upon the petition of the wife, upon the ground that the husband, since the marriage, has been guilty of incestuous adultery, or bigamy with adultery, or rape, or unnatural crime, or adultery coupled with certain kinds of cruelty, or with

Judicial
separation.

Divorce under
the new Act.

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CHAP. XV.

desertion, without reasonable excuse, for two years or upwards. (Sect. 27.) But the Court may not grant a divorce, if the petitioner has been accessory to or connived at the adultery, or has condoned it. (Sect. 29.)

1478

By the common law, the wife does not forfeit by adultery any benefit under her marriage settlement or under a deed of separation. But by the stat. 20 & 21 Vict. c. 85, s. 45, the Divorce Court may deal with her property on her divorce for her adultery. (2 Ste. Com. 288.) The like provision may also be made on a decree that the marriage is void. (*Langworthy v. Langworthy*, 11 P. D. 85.)

1479

Annuling
marriage.

Marriages may be annulled where they have taken place after a divorce obtained by fraud or collusion, or from a Court not having competent jurisdiction; or where the parties are within the prohibited degrees of consanguinity or affinity, or both have acted in wilful disobedience of certain of the enactments as to the marriage ceremony; or where there was, in either of the parties at the time of the marriage, corporal incapacity, idiotcy, or lunacy; or where the marriage was the result of force or fear, not followed by voluntary cohabitation. (*Clarke v. Clarke*, (1896) P. 1; *Moss v. Moss*, (1897) P. 263.)

1480

Separation
by consent.

The husband and wife may agree to live separately; and the Courts of Law and Equity have recognised the validity of deeds or articles of separation, where the husband and wife have actually separated. But an agreement relating to a separation not actually existing, or a covenant for separation, whether immediate or future, is void. (2 Ste. Com. 282-3.)

1481

PART III.

OF THE ENFORCEMENT OF PRIVATE RIGHTS, AND OF
EVIDENCE IN CIVIL CASES.

TITLE I.

The Enforcement of Rights.

CHAPTER I.

OF THE DIFFERENT KINDS OF ACTIONS; OF JUDGMENT; AND OF DAMAGES.

I. *The different kinds of Actions (a).*

ACTIONS used to be divided into three classes—real, personal, and mixed. Real actions, which relate to real property, were by the statute 3 & 4 Will. IV. c. 27. reduced to three—writ of right of dower, dower unde nihil habet, and quare impedit; and by the Common Law Procedure Act, 1860, these writs were abolished, and the plaintiff who wished for the relief formerly sought by them might commence his action by writ of summons in an ordinary action, and on such writ indorse a notice that he intended to declare in dower, or for free-bench, or in quare impedit, as the case might be. Mixed actions were also abolished,

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TIT. I.
CHAP. I.

Division of
actions.

(a) Although a new course of procedure has been introduced by the Judicature Acts, it is still necessary to know something of the distinctions noticed under this heading, as the books are full of them. But it must be borne in mind, when reading this chapter, that the present work is one on Jurisprudence, and not on Pleadings and Practice. For detailed information on Pleadings and Practice, the reader is referred to Chitty's Archbold's Practice.

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TIT. I.
CHAP. I.

except the action of ejectment, termed by some a mixed action, and by others a real action. (Broom, Com. 146-7; 3 Ste. Com. 399-401.) **1482**

Personal
actions.

Personal actions are those which are brought for the recovery of goods and chattels, or for damages in respect of breaches of contract, or in respect of torts. **1483**

Personal actions are divided into—

I. Actions *ex contractu*, or in contract, in which the cause of action springs directly out of, or is founded upon, contract. **1484**

II. Actions *ex delicto*, or of tort, in which the cause of action is founded upon a wrong independent of contract. (Broom, Com. 147; 3 Ste. Com. 401.) **1485**

Actions *ex*
contractu.

I. Actions on contract were divisible into *assumpsit* (which was included by some in trespass on the case), debt, and covenant. *Detinue* was classed by some writers among actions on contract, but by others it was treated as an action of tort, and will be so considered in a subsequent page. (3 Ste. Com. 401; see *Bryant v. Herbert*, 3 C. P. D. 389.) **1486**

Assumpsit would lie where damages were claimed for the breach of a promise not made by deed. It was essential that the promise should be founded on a sufficient consideration. Debt would lie where the object was the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff. Covenant was brought when redress or the payment of damages was sought for the breach of an agreement entered into by deed. **1487**

Actions
ex delicto.

II. Actions *ex delicto*, or founded on tort, were trespass, case, trover and conversion (which was a species of action of trespass on the case), and replevin. And, as already mentioned, according to the classifica-

tion adopted by some writers, detinue might be classed with actions on tort. (See above, par. 1486.) **1488**

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Trespass signifies any injury to person, character, or property, which is redressed by the municipal law. Where an injury to the real or personal property of another, or to his person or character, was caused directly and immediately by the act of the defendant, an action of trespass was the appropriate remedy. But where such an injury was caused mediately and consequentially by the act of the defendant, or where that which was injuriously affected was not corporeal, so that the idea of force was inapplicable, an action of trespass on the case (or "case," as it was, for brevity, usually called) was the proper remedy. This was the leading distinction, but it was often very refined and difficult of application. The action of trespass was always for an injury supposed, in contemplation of law, to be accompanied with violence, and for this reason was usually called trespass *vi et armis*. Redress was obtained in the shape of damages. (3 Bl. Com. 153, 208; 3 Ste. Com. 402-3; Odgers, P. 170.) **1489**

Action of
trespass and
trespass on
the case.

Where goods were wrongfully removed, an action might be maintained by the person who was in actual possession of them or had a constructive possession of them in respect of a vested right to them. This was termed trespass *de bonis asportatis*. (3 Ste. Com. 469; 2 Rosc. 924.) **1490**

Trespass for
removal of
goods.

Where a person has wrongfully converted chattels to his own use, either actually or constructively, according to the technical import of the word conversion, the person who had an absolute or qualified property in them, and had the right of possession as against him, might bring an action of trover: which was originally applicable only to chattels detained by one who had found them,

Action of
trover and
conversion, or
for conver-
sion.

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or come lawfully to the possession of them, and which was sometimes called an action for conversion, or of trover and conversion. (*Burroughes v. Bayne*, 5 H. & N. 296.) But the judgment in this action was for the recovery of damages only, equal to the value of the chattels, not for the recovery of the specific chattels. (3 Bl. Com. 152-3; 3 Ste. Com. 471; Mayne, 379.) **1491**

The gist of the action of trover did not consist in the wrongful taking, as in the case of trespass de bonis asportatis, but in the conversion. (3 Ste. Com. 471-2; Mayne, 379; 2 Rose. 946.) **1492**

A conversion is an asportation or disposal of a chattel for the use of the defendant or some other person, or an assertion of right to the dominion over it by the defendant, and a refusal to deliver it up at all, or except on conditions which the defendant has no right to impose, or a wilful destruction of it, or a detaining it so as to deprive the owner of the dominion over it. (2 Rose. 946, 965-6; *Burroughes v. Bayne*, 5 H. & N. 296; *Pillot v. Wilkinson*, 2 H. & C. 72, 345; *Johnson v. Stear*, 15 C. B. (N. S.) 330. See *Hollins v. Fowler*, L. R. 7 H. L. 757; *England v. Cowley*, L. R. 8 Ex. 126; *Hiort v. Bott*, L. R. 9 Ex 86; *Rogers v. Lambert* (1891), 1 Q. B. 318.) **1493**

In actions for the conversion of chattels, the full value of the chattels at the time of the conversion was in general the measure of the damages. But if special damage, as the necessary consequence of the conversion, had been sustained and was claimed, an amount far exceeding the value of the goods might often be recovered. And, on the other hand, if the goods had been tendered and received back after action, the plaintiff might proceed in the action for the actual damage (if any) and his costs. (2 Rose. 973-5; Mayne, 379,

393, 398 ; *Edmondson v. Nuttall*, 17 C. B. (N. S.) 280.)
1494

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Replevin is the re-delivery or restitution of goods wrongfully taken from any person having an absolute or qualified property in them. It is almost exclusively confined in practice, however, to the re-delivery of things taken by way of distress for rent or for damage feasant, that is, damage done. (2 Rose. 1069.) **1495**

Action of
 replevin.

Where chattels were unjustly detained, although the original taking of them was not unlawful, an action of detinue might be brought to recover them, or the value of them. This may now be done by a writ of delivery. (3 Bl. Com. 161 ; 3 Ste. Com. 469-70 ; 2 Rose. 988-90 ; Mayne, 406 ; Rules of the Supreme Court, 1883, Ord. XLII. r. 6, Ord. XLVIII.) **1496**

Action of
 detinue.

When a person entitled to land has a right of entry, he may take possession, provided he does so in a reasonable manner, without force. But if the right of entry is not clear, or the person in possession is an obstinate man, it is best to proceed by action for the recovery of land, formerly termed ejectment. (2 Chit. Arch. 1201 ; Cole, Eject. 66-71.) **1497**

Action for
 recovery of
 land, formerly
 termed eject-
 ment.

An ejectment was the ancient denomination of the proceeding by which the title to lands and tenements was tried (though not conclusively and finally), and the possession recovered, in cases where the party claiming title had a right of entry, whether such title was to an estate in fee, in tail, for life, or for years. An ejectment was formerly a fictitious proceeding, but the procedure was afterwards altered, and since the Judicature Acts it has been superseded by an action for the recovery of land, for which a right of entry in the plaintiff is still

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necessary. The plaintiff may claim in respect of mesne profits which the defendant has wrongfully received; also arrears of rent for the last six years, or double value and damages for breach of contract, or for injury in respect of the property claimed. (Cole, 1-3, 77, 91, 634-5; 3 Bl. Com. 199-206; 3 Ste. Com. 431-9; Broom, Com. 867-8; Mayne, 375; 2 Rosc. 991-1069; 2 Chit. Arch. 1207; Odgers, P. 23-4, 189-90; Rules of the Supreme Court, 1883, Ord. XVIII. r. 2.) **1498**

Action of
trespass quare
clausum
fregit.

There is one species of action of trespass which may be naturally mentioned here. Every unwarrantable entry on the soil of which another is in possession, whether such entry is by a person himself or by his cattle, and whether it is productive of any actual specific damage or not, is termed a trespass by breaking his close; and the action for this wrong was called an action of trespass quare clausum fregit; for every man's land is, in the eye of the law, enclosed and set apart from his neighbour's, either by a visible and material fence, or by an invisible ideal boundary, existing only in contemplation of law, as when one man's land adjoins to another in the same field. (3 Bl. Com. 209; 3 Ste. Com. 441-4; Broom, Com. 870.) **1499**

In respect of the mere violation of the plaintiff's right, he is entitled to recover at least nominal damages; and in respect of any specific damage, he is entitled to further or special damages. (Broom, Com. 871; Mayne, 4, 10.) **1500**

Old forms of
action super-
seded.

Under the Judicature Acts, 1873 and 1875, a short statement of the cause of an action must be indorsed on the writ of summons, and the old forms of action are thus superseded; but cases in tort may occur in which it is doubtful whether an action lies without proof of

actual damage, or, assuming that the plaintiff is entitled to judgment, whether the judgment shall be for the value of the goods or only for his actual damage. Under such conditions it is necessary to see what the appropriate section would have been under the old forms. (Pol. Torts, 307.) **1501**

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II. *Judgment.*

Where a judgment has been obtained, whether in a matter of contract or in a matter of tort, the cause of action becomes merged and changed into a matter of record: transit in rem judicatam; and after a judgment recovered against one of two joint debtors or joint tortfeasors, the other cannot be sued, though no satisfaction was obtained from the former. (Broom, Com. 257-9; *Brinsmead v. Harrison*, L. R. 7 C. P. (Ex. Ch.) 547; *Kendall v. Hamilton*, 4 App. Cas. 504; *Hoare v. Niblett*, (1891) 1 Q. B. 781; and see *Wegg Prosser v. Evans*, (1895) 1 Q. B. 108.) **1502**

Judgment operates as a merger of the cause of action.

Judgment against one of two joint debtors or tortfeasors.

By a final judgment inter partes, they are estopped or prevented from again litigating the matter. But those who are neither party nor privy to it will not be affected except where it relates to public matters. Nor will it be of any avail where it is given by a person who is interested, or where it has been obtained by fraud. (Broom, Com. 260-2; 1 Rose. 189-92; *Newington v. Levy*, L. R. 6 C. P. (Ex. Ch.) 180; *Duchess of Kingston's case*, 2 Sm. L. C. 812.) **1503**

Judgment an estoppel.

And a judgment obtained in an action for damage to goods, is no bar to an action subsequently commenced for personal injury occasioned by one and the same wrongful act, since damage to goods and injury to the person are infringements of different rights, and give rise to distinct causes of action. Thus, where a cabman

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brought an action in the County Court for injury to his cab, caused by the negligence of the defendant's servant, and obtained damages, it was held that he was entitled to bring subsequently an action in the High Court of Justice for damages for personal injury caused by the same wrongful act of the defendant's servant. (*Brunsden v. Humphrey*, 14 Q. B. D. 141.) **1504**

Also there may be successive actions by the same plaintiff for damages for successive injuries to the same property from successive subsidences of the same land caused by the same excavation of neighbouring land. Thus, where a company in 1867 and 1868, but not afterwards, made excavations which they then left untouched, and which caused a subsidence of neighbouring land with injury to buildings thereon, in 1868, and again in 1882, and the damage caused by the subsidence in 1868 had been satisfactorily repaired by the company, it was held that the injury caused by the subsidence in 1882 gave a fresh cause of action to the owner of the neighbouring land and buildings. (*Mitchell v. Darley Main Colliery Co.*, 11 App. Cas. 127.) **1505**

III. *Damages.*

General
remarks on
damages.

In addition to the remarks incidentally made on damages, in the course of the preceding pages, some general observations on the same subject may here be added. **1506**

Damages are either nominal, general or special. Where a contract has been broken, but no actual damage has been caused, nominal damages are recoverable. Where actual damage under ordinary circumstances has been caused, general damages are recoverable. Where actual damage under special

circumstances has been caused, special damages are recoverable. In the case of breach of contract, the measure of damages is more strictly confined than in cases of tort. (Ad. Con. 255-6; Broom, Com. 718.)

1507

The jury who try the cases assess the damages; but it is the province of the judge to direct them as to any rule of law by which they ought to be governed in making the assessment. (Mayne, 577.) **1508**

Damages will be given in every case where a plaintiff succeeds in an action for breach of a contract; but where no loss is sustained, they will be only nominal. (Broom, Com. 720; Chit. Con. 719; Ad. Con. 255.) **1509**

Where there is a penalty and a covenant in the same deed to secure the performance of an agreement, the party aggrieved by the non-performance may sue either for the penalty or for damages under the covenant. But even in the former case, in consequence of the statute 8 & 9 Will. III. c 11, s. 8, he cannot recover a larger amount (not exceeding the penalty) than the jury assess as the damages. And where a person sues on a bond with a penalty for securing performance of an agreement, not being a bond conditioned for the mere non-payment of money, he cannot recover a larger amount (not exceeding the penalty) than the jury assess as the damages. (Ad. Con. 264-7; Chit. Con. 714-9; Mayne, 144-6.) **1510**

Where, on breach of an agreement, an ascertained sum is to be paid, that sum, together with interest, when recoverable, will be the measure of damages, unless the circumstances are such as lead the Court to the conclusion that such a sum is really a penalty. The construction of the agreement will not depend on the name given in it to the sum; for it may be con-

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Measure of damages.
With whom question of damages rests.

Where they will be given in actions on contract.

Cases where there is a penalty.

Cases of liquidated damages.

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strued to be a penalty, though expressed to be a sum payable by way of liquidated, that is, ascertained, damages, and not by way of penalty; or it may be construed to be liquidated damages, though expressed to be a penalty. If it is held to be a penalty, the amount recoverable is not the sum named, but the damage actually incurred. And the circumstances which tend to extenuate the defendant's conduct, or to throw the blame partly on the plaintiff, will be taken into account in mitigation of damages. (Broom, Com. 723-7; Mayne, 142-55; Ad. Con. 267-72; *Sparrow v. Paris*, 7 H. & N. 594; *Wallis v. Smith*, 21 Ch. D. 243; *Law v. Local Board of Redditch*, (1892) 1 Q. B. 127.)

1511

Damages
naturally re-
sulting from
a breach of
contract.

Where a person makes a contract, and breaks it, he must pay the whole damage naturally resulting, i.e., resulting and likely to have so resulted from such a breach in the ordinary course of things, or such damages as may be reasonably supposed to have been in the contemplation of the parties. Thus, where a person sells a cow with foot and mouth disease to another person whom he knows to be a farmer, and the buyer places the cow with others, and they take the disease from her, and she and they die of it, the seller is responsible for the whole loss. But ordinarily a person will not be liable for more remote damages. And if the loss is a natural consequence of the breach by reason of special circumstances, it must in general be shown that they were known to the defendant, or he must be sufficiently put upon inquiry to render it incumbent upon him to have made himself acquainted with them, before he can be made liable for damages for such a loss. (Broom, Com. 735-41; Mayne, 11-44; Chit Con. 720-2; Ad. Con. 259-63. See *Great Western Rail. Co.*

v. Redmayne, L. R. 1 C. P. 329; *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. 181; *Horne v. Midland Rail. Co.*, L. R. 7 C. P. 583; 8 C. P. (Ex. Ch.) 131, 144-5; *Smith v. Green*, 1 C. P. D. 92; *Fisher v. Val de Travers Asphalte Co.*, 1 C. P. D. 511; *Simpson v. London & N. W. Rail. Co.*, 1 Q. B. D. 274; *Grébert Borgnis Co. v. Nugent*, 15 Q. B. D. 85.) **1512**

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In the case of common carriers, who have no option to refuse to carry goods, the fact that they are informed of special damage which will happen through delay on their part will not make them liable for such special damage. (*Hadley v. Baxendale*, L. R. 9 Ex. 341, 354.)

1513

In an action for the non-delivery or for the non-acceptance of goods, stock, or shares, purchased, but not paid for, the measure of damages is the difference (if any) between the contract price and their market price at the time when they ought to have been delivered or accepted, or, if no time fixed, then at the time of the refusal to deliver or accept: so that if there is no such difference, nominal damages only will be recoverable. But, on proof that time, trouble, and expense have been occasioned, the measure of damages may be increased. (Broom, Com. 440; Mayne, 170-1, 176-81; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 50, 51.) **1514**

Damages for non-delivery, or non-acceptance of goods, shares, or stock sold;

Where the contract is to deliver in parcels at different times, the difference ought to be taken at the end of each period. (*Brown v. Muller*, L. R. 7 Ex. 319.)

1515

Where a purchaser of goods to be delivered by a certain day re-sells them before that day, and the original seller does not fulfil his contract, so that the purchaser from him is prevented from fulfilling his

where contract is to deliver in parcels at different times;

where purchaser re-sells goods before delivery;

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contract of re-selling, the original purchaser cannot recover from the original seller the profit, he, the original purchaser, would have made by the re-sale, though it be usual for a re-sale to be made before delivery to the original purchaser. The damages will only be the difference between the price under the original contract and the market price on the last day for delivery, where the price of the article has risen with an allowance for any considerable trouble or costs out of pocket on the original purchase. (Mayne, 177; *Williams v. Reynolds*, 6 B. & S. 495.) **1516**

where contract made to fulfil previous engagement.

Where vendors contracted with a purchaser to deliver to him goods of a particular shape and description at certain prices, and by instalments at different times, knowing, at the time their contract was entered into, that it corresponded, except as to price, with and was made to enable the purchaser to fulfil a previous contract with a foreign customer; and in consequence of the vendors breaking their contract, the foreign customer, there being no market for goods of the description contracted for, recovered damages from the purchaser in a French court; it was held, in an action by the purchaser against the vendors for breach of contract, that the purchaser was entitled to recover as damages the amount of profit he would have made if he had been able to fulfil his contract with his foreign customer, and also damages in respect of his liability to such customer, and that the award of the French court might be considered a reasonable estimate of such damages. (*Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85.) **1517**

Damages for non-delivery against a carrier.

In an action against a railway company or carrier for the non-delivery of goods, the measure of damages is the price at which the goods can be obtained in the market for such goods, if there is one, at the place and time at

which they ought to have been delivered; and if not, the damages must be ascertained by taking into consideration the cost price and the expenses of transit, and the profit likely to be made by a person importing them to such place. (*O'Hanlan v. Great Western Rail.*, 6 B. & S. 484.) **1518**

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In an action by a purchaser for breach of a contract to sell real estate or a chattel real, when the sale goes off for want of a good title, without any fault on the part of the vendor, or even if the vendor entered into the contract knowing that he had not a good title, nor any means of acquiring a good title, the purchaser cannot recover damages beyond the amount of the expenses he has incurred. But he may obtain further damages by an action for deceit, if he can show fraud on the vendor. (*Broom*, Com. 733; *Mayne*, 43-4; *Ad. Con.* 477; *Bain v. Fothergill*, L. R. 6 Ex. 59; 7 H. L. 158.)

Damages in an action by a purchaser of realty.

1519

In an action by a vendor against a purchaser of real estate who refuses to complete, where no conveyance has been executed, the vendor can only recover the damages actually sustained by the breach of the contract; that is, the difference (if any) between the agreed price and the market price as ascertained by a re-sale, if the vendor has exercised his right of re-sale within a reasonable time, or as computed, together with the expenses he has incurred. As he retains the land, he cannot have the purchase-money also. (*Broom*, Com. 733-4; 1 *Rosc.* 316; *Ad. Con.* 476-7; *Mayne*, 206.)

Damages in an action by a vendor of realty.

1520

Specific performance of contracts as to land can be, under certain circumstances, obtained in equity instead of damages, and specific delivery of chattels of special or peculiar value would be directed; and now by the

Specific performance.

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Common Law Procedure Act, 1854 (17 & 18 Vict. c. 145), the Court, in an action of detinue, can order execution to issue for the return of the chattel, without giving the defendant the option of retaining the chattel upon paying the value assessed. Under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, the Court has power to order the specific performance of contracts to deliver specific or ascertained goods, without giving the defendant the option of retaining the goods on payment of damages. **1521**

Motive or
animus.

In determining the amount of damages to be awarded for breach of a contract, the motive or animus of the defendant is disregarded, except in those cases in which the breach of contract is in the nature of a tort. In such cases (as in cases of breach of promise of marriage) high damages may be recovered, without proving any substantial injury. (Broom, Com. 718-20 ; Mayne, 43.)

1522

Damages in
actions of
tort.

In actions of tort, the damages are, in general, simply by way of compensation. But the jury may take into account not only the present injury and expense, but the probable future injury, the feelings of the party injured, and, in some cases, the animus of the wrongdoer, as well as circumstances of aggravation or mitigation. And in some cases (as in cases of wilful wrong, especially if accompanied with insolent expressions) damages are given which may be regarded as penal. Such damages are termed exemplary or vindictive. (Broom, Com. 970-5 ; Mayne, 44-7.) **1523**

An action of tort may be maintained for damages, proximately, naturally, or probably, and not too remotely, resulting from the tortious act or negligence (whether alone or combined or followed by some other act or circumstances naturally or probably arising), or

from special circumstances connected with the tortious act or negligence, and known to the defendant. (Mayne, 47 et seq.; *Scott v. Shepherd*, 1 Sm. L. C. 438; *Hoey v. Felton*, 11 C. B. (N. S.) 142; *Glover v. London & S. W. Rail. Co.*, L. R. 3 Q. B. 25; *Sharp v. Powell*, L. R. 7 C. P. 253; *Gee v. Metropolitan Rail. Co.*, L. R. 8 Q. B. (Ex. Ch.) 161; *Halestrap v. Gregory*, (1895) 1 Q. B. 561; 1 Q. B. D. (Ap.) 42; *Jackson v. Metropolitan Rail. Co.*, 3 App. Cas. 193; *Clark v. Chambers*, 3 Q. B. D. 327; *Harris v. Mobbs*, 3 Ex. D. 268; *Mowbray v. Merryweather*, (1895) 2 Q. B. 640.) **1524**

It is not a natural consequence of the negligence of a railway company in allowing their carriages to be overcrowded that one of the passengers should be assaulted or robbed. (*Pounder v. N. E. R. Co.*, (1892) 1 Q. B. 385; *Cobb v. G. W. R. Co.*, (1893) 1 Q. B. 459.) **1525**

Damages for injury to health caused by mental shock may, under certain conditions, be recovered. (*Wilkinson v. Downton*, (1897) 2 Q. B. 57.) **1526**

Damages may be recovered for what is a natural and probable, though it may not be a legal, consequence of the defendant's wrongful act; as where a manager of a theatre induced a singer to break a contract with the manager of a rival house. (*Lumley v. Gye*, 2 E. & B. 216.) **1527**

In general, the Court will not disturb a verdict, where there is no certain measure of damages. But if the jury give damages in respect of matters extraneous to the case; or if there is some error in law, or unquestionable mistake in calculation, or gross misconduct of the jury; or if the damages are grossly excessive or inadequate, a new trial will be granted. (1 Chit. Archb. 735-6; Mayne, 577-8; Broom, Com. 182-3, 975-6;

Where a new trial will be granted on account of the damages given.

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Chit. Con. 590; Odgers, P. 295-8; *Præd v. Graham*, 24 Q. B. D. 53.) **1528**

Reduction of
damages by
accidental
insurance
policy.

In an action for injuries caused by defendants' negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages; because he receives that sum as an equivalent for the premiums he has paid (*Bradburn v. Great Western Rail. Co.*, L. R. 10 Ex. 1); but money received from an insurance company must be taken into account in estimating the compensation awarded under the Fatal Accidents Act, 1846. (Lord Campbell's Act, 9 & 10 Vict. c. 93; Mayne, 516-7.) **1529**

Interest.

In actions on contract interest may sometimes be awarded by the jury in addition to damages. (See above, pars. 1287-91.) **1530**

Double and
treble
damages.

There are, or were, various statutes giving double and treble damages against a person violating their provisions. Thus treble damages were given for extortion by sheriffs; and double damages are given for distraining the plaintiff's goods when no rent is due. In these cases the sum returned by the jury is, without further communication with them, doubled or trebled in amount. (Mayne, 574; 13 Hen. VI. c. 10, s. 11; 29 Eliz. c. 4; 2 W. & M. c. 5, s. 4.) **1531**

Injuries to
land.

In cases of injuries to land, a tenant may sue for damages for the injury to his possessions, and the landlord for the injury to the reversion. (Mayne, 430-1.) **1532**

CHAPTER II. (a).

OF THE LIMITATION OF ACTIONS.

UNDER stat. 3 & 4 Will. IV. c. 27, ss. 2, 16, 17, an action or suit to recover any land or rent (existing as an inheritance distinct from the land) could be brought within twenty years next after the time at which the right to bring such action or suit first accrued; or in case of disability of infancy, coverture, unsoundness of mind, or absence beyond the seas at such time, then within ten years from the termination of such disability or his death, notwithstanding the expiration of the twenty years; provided that the action or suit must have been brought within forty years from the first accruer of the right. But these sections have been repealed by stat. 37 & 38 Vict. c. 57, which substitutes twelve years for the period of twenty years, with an allowance of six years in case of disability, except absence beyond seas, instead of ten years, with an ultimate limitation of thirty years, instead of forty years. A further period is not now allowed in the case of absence beyond seas of the plaintiff. **1533**

Under stat. 3 & 4 Will. IV. c. 27, s. 28, a mortgagor was barred at the end of twenty years from the time when the mortgagee took possession, or from the

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Limitation of
actions, in the
case of land
or rent;

in the case of
a mortgage;

(a) For a more detailed account of the subject of this chapter, see Smith's Real and Personal Property, 6th ed., by the author and J. Trustram.

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last written acknowledgment. But this section is repealed by stat. 37 & 38 Vict. c. 57, which substitutes twelve years for the period of twenty years. **1534**

in the case of
ecclesiastical
or eleemosy-
nary corpora-
tion sole ;

No land or rent can be recovered by any ecclesiastical or eleemosynary corporation sole after two incumbencies and six years, or such further time as will make up sixty years from the accruer of the right. (3 & 4 Will. IV. c. 27, s. 29.) **1535**

in the case of
a right of
presentation
or advowson ;

No benefice can be recovered after three adverse incumbencies, or such further period as will make up sixty years, whichever is longer, but in any case not after a hundred years' adverse possession. (3 & 4 Will. IV. c. 27, ss. 30, 33.) **1536**

in the case of
money
charged upon
or payable
out of land
and legacies ;

Under stat. 3 & 4 Will. IV. c. 27, s. 40, no proceeding could be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, or any legacy, but within twenty years next after a present right to receive the same accrued to some person capable of giving a discharge for or release of the same ; unless in the meantime some part of the principal money, or some interest thereon, was paid, or some acknowledgment of the right thereto was given in writing, signed by the person by whom the same was payable, or his agent, to the person entitled thereto or his agent ; and in such case no proceeding could be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. But this section is repealed by stat. 37 & 38 Vict. c. 57, which by sect. 8 substitutes twelve years for the period of twenty years, and makes a somewhat more extensive provision by the addition of the words "at law or in equity" after the word "rent." **1537**

By stat. 23 & 24 Vict. c. 38, s. 13, actions against personal representatives to recover the personal estate of intestates may be brought within twenty years from the time of accrual, or of the last acknowledgment of right. An action for recovery of a legacy must be brought within twelve years. (37 & 38 Vict. c. 57, s. 8; *Re Johnson, Sly v. Blake*, 29 Ch. D. 694.) **1538**

PART III.
TIT. I.
CHAP. II.

in the case of
actions
against per-
sonal repre-
sentatives;

No arrears of dower, nor any damages on account of such arrears, can be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit. (3 & 4 Will. IV. c. 27, s. 41.) **1539**

in the case of
dower;

No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears, can be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent. (3 & 4 Will. IV. c. 27, s. 42; but see below, par. 1546.) **1540**

in the case
arrears of
rent or
interest;

In respect of any holding to which the Agricultural Holdings Act, 1883, applies, the right of distress is limited to rent which became due not more than one year before the making of such distress with certain exceptions. (46 & 47 Vict. c. 61, s. 44.) **1541**

as to agri-
cultural
holdings;

Actions for assault, menace, wounding, and imprisonment, must be brought within four years; actions for verbal slander within two years; and other actions of trespass for injuries to the person, or to land, or to personal property, and actions for libel, and actions for arrears of rent on a demise without deed, and other

in the case
trespass,
trespass on
the case,
detinue,
trover,
replevin, and
simple
contract;

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actions on simple contract, within six years after the cause of action accrued, or after the removal of the disability, in the case of any person entitled to sue being an infant, or a married woman, or non compos, at the time when the cause of action accrued, or after the return of a person liable to be sued, being at the time beyond the seas. (21 Jac. I. c. 16, ss. 3, 7; 3 & 4 Will. IV. c. 42, s. 3; 4 & 5 Anne, c. 16, s. 19; 19 & 20 Vict. c. 97, ss. 9-11.) **1542**

But the protection of the statute, in cases of debt, is removed, if the defendant has, before or after the lapse of time, given an unconditional acknowledgment in writing of the debt, signed by him or his agent, in such terms as express or imply, or at least do not preclude the Court from inferring, a new promise to pay, unconditionally, or on request, or on a condition which has been fulfilled, or at a time which has passed, or on an event which has happened. In such case, an action may be grounded on the new promise. The old debt is only revived as a consideration to support the new promise. (9 Geo. IV. c. 14; 19 & 20 Vict. c. 97, ss. 13, 14; *Cockrill v. Sparkes*, 1 H. & C. 699; *In re River Steamer Co., Mitchell's Claim*, L. R. 6 Ch. App. 822; *Chasemore v. Turner*, L. R. 10 Q. B. (Ex. Ch.) 500; *Newbould v. Smith*, 14 App. Cas. 423; Banning on "Limitation of Actions," Ch. IV.) And part payment of principal or interest may take the case out of the statute. (*Maber v. Maber*, L. R. 2 Ex. 153.) But part payment will not prevent the statute running, unless it is made to the creditor or his agent. (*Stamford Banking Co. v. Smith*, (1892) 1 Q. B. 765.) **1543**

A request to a creditor to send in his account is an acknowledgment which will take the case out of the statute. (*Quincey v. Sharpe*, 1 Ex. D. 72; *Curwen v. Milburn*, 42 Ch. 424.) **1544**

Actions of covenant or debt on any bond or other specialty must be brought within twenty years after the cause of action accrued, or after the removal of the disability in the case of a person entitled to sue being an infant, married woman, or non compos, or after the return of the defendant if beyond seas; or from the date of an acknowledgment of a debt, in writing signed by the defendant or his agent, or from a part payment of principal or interest. (3 & 4 Will. IV. c. 42, ss. 3-5; 19 & 20 Vict. c. 97, s. 10.—And as to the Statutes of Limitation, relating to these and the several other cases above mentioned, see also Banning on “Limitation of Actions.”) **1545**

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TIT. I.
CHAP. II.

in the case of
debt for rent,
or covenant,
or debt on
any specialty;

Thus, no more than six years' arrears of rent or interest in respect of any sum charged on or payable out of land or rent is recoverable by way of distress, action, or suit, other than and except an action of covenant or debt on the specialty, in which case the limitation is twenty years (3 & 4 Will. IV. c. 27, s. 42, and c. 42, s. 3); while in an action on the covenant in a mortgage deed, on a bond given by the mortgagor as collateral security to a mortgage, the period of limitation is twelve years. If, however, there is a collateral bond by a third person, the period of limitation is twenty years. (*Sutton v. Sutton*, 22 Ch. D. 511; *Fearnside v. Flint*, *ibid.* 579; *In re Powers*, *Lindsell v. Phillips*, 30 Ch. D. (Ap.) 291; 37 & 38 Vict. c. 57, s. 8.) **1546**

In both simple and specialty contracts, and in cases of tort, no further time is allowed in case of disability, unless the disability was existing at the time of the accrual of the cause of action. No further period is now allowed in the case of the plaintiff being beyond seas. (19 & 20 Vict. c. 97, s. 10.) **1547**

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TIT. I.
CHAP. II.

judgment
debts;

in other
cases.

Judgment debts are (in the absence of part payment or acknowledgment in writing) barred in twelve years.

(*Hebblethwaite v. Peever*, (1892) 1 Q. B. 124; *Jay v. Johnstone*, (1893) 1 Q. B. 189.) **1548**

Actions and suits, in certain other cases, are also subjected to Statutes of Limitation. (See Trustee Act, 1888 (51 & 52 Vict c. 59), s. 8; Banning, 217; and par. 1545, above.) **1549**

TITLE II.

OF THE LEADING PRINCIPLES AND RULES OF EVIDENCE BY WHICH THE COURTS OF COMMON LAW ARE REGULATED, IN CIVIL CASES (*a*).

EVIDENCE is either direct or indirect. Direct evidence is that which directly proves a fact, by witnesses, things, or documents. Indirect or circumstantial evidence is that which only indirectly proves a fact, by way of inference; and it is either conclusive or presumptive, according as the fact to be proved is a necessary consequence, or is only a matter of probable inference. (Best, 15-16, 276.) **1550**

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Direct evidence is either primary or secondary. Primary evidence is that which constitutes the most original and the highest kind of proof. Secondary evidence is that which constitutes a derivative and inferior kind of proof, necessarily presupposing the existence of better proof not adduced. (Best, 70, 416; 1 Rose. 1, 4.) **1551**

Primary and
secondary
evidence.

It is a general rule that the best or highest kind, though not the fullest quantity, of evidence, of which the nature of the case admits, and which can be obtained, must be given; and that secondary evidence is only admissible where primary evidence cannot be

General rule
as to the kind
of evidence to
be adduced.

(*a*) In addition to the treatise of Mr. Best, and the practical work of Mr. Roscoe on "Evidence at Nisi Prius," the reader is referred generally to the works of Mr. Powell, Mr. Phillips, Mr. Starkie, Judge Pitt-Taylor, and others, on the same subject.

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obtained. And hence a person may not adduce such evidence as necessarily presupposes the existence of a higher kind of evidence, of which he might have availed himself, but which he has kept back. Thus, if there is a contract in writing, the writing must be produced, unless it is destroyed. There may, however, be distinct sources of evidence—in writing and oral; so payment of a debt may be proved by producing the written receipt or by the oral deposition of the debtor. (Best, 70-1, 416; 1 Rose. 1, 4; Powell, 16.) **1552**

But circumstantial evidence, when original and proximate, is not affected by the rule. So that circumstantial evidence is admissible, even where direct evidence might have been produced, though the absence of direct evidence may be the subject of comment to the jury. (Best, 429.) **1553**

When private documents are facts in issue, no derivative evidence of their contents is receivable until the absence of the original writing is accounted for. (Best, 416.) **1554**

There are two exceptions to the rule that the best evidence must always be given—secondary evidence and hearsay evidence are sometimes admissible. **1555**

When primary evidence cannot be had, or at least without such a degree of inconvenience as to amount to that which would be in the highest degree unreasonable, secondary evidence is receivable: as when an original document is destroyed or lost, or is in the possession of the adverse party who does not produce it after due notice, or of a party who is privileged to withhold it and insists on his privilege, or of a party who is out of the jurisdiction of the Court; or as in the case of documents of a public nature, such as records, court rolls, public books, registers of births, baptisms, mar-

riages, deaths, and burials, of which, to prevent inconvenience, an exemplification or office copy, or a certified or examined copy, is sufficient evidence. (Best, 420-7 ; 1 Rosc. 4-7.) **1556**

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Copies of entries in bankers' books may be given in evidence upon proof that the entries have been made in the usual course of business, and that the copies have been examined with the books and found correct. (42 & 43 Vict. c. 11.) **1557**

Entries in
bankers'
books.

Probate of a will is the proper legal proof of title in an executor to his testator's personalty, and, by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), to the testator's realty also. It is a copy of the will sealed with the seal of the Probate Division of the High Court, and attached to a certificate which states that the will has been proved and registered, and administration granted. If the probate be lost, it may be proved by an examined copy. (Powell, 362-3.) **1558**

Probate of a
will.

The law does not recognize any degrees in secondary evidence. A party entitled to resort to secondary evidence may in general resort to any form of it. Thus, the evidence of a witness who has read a destroyed or lost document is receivable, though a copy of it is in existence. But that which is adduced as evidence must really amount to legitimate proof ; so that a copy of a copy is not receivable ; and a copy, to be admissible, must be proved to be accurate by a person who made it, or compared it with the original. (Best, 423-4 ; and see *Sugden v. Lord St. Leonards*, 1 P. D. 154.) **1559**

Kind of
secondary
evidence
which is
receivable.

In a matter between the same parties, statements by a witness at a former trial or suit may be used on a subsequent trial or suit, if the witness be dead, cannot be found, or is unable to travel. The matter in issue

Secondary
evidence of
oral testi-
mony.

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must be the same, and such statements are not evidence against any person who was not party or privy to the former proceedings. (Best, 437-8; Powell, 237.)

1560

Hearsay
evidence.

Hearsay evidence is generally inadmissible. Hearsay evidence is defined as some oral or written statement of a person who is not produced in Court, conveyed to the Court by a witness or by a document. (Powell, 157.) Hearsay evidence is not as a rule admissible because it is not given on oath; the party against whom the proof is offered has no opportunity of cross-examining the original source from whence it is derived, and the evidence is not given under personal responsibility. (Best, 434-5.) "Hearsay" must not be taken to mean simply "what a person has been heard to say." For what a person has been heard to say against his own interest (i.e., an admission) is the best evidence against him, and, on the other hand, written documents with which a party is not identified are frequently rejected. So, too, hearsay evidence must not be confounded with *res gestæ*, i.e., the original proof of what has taken place, which may consist of words as well as of acts. Thus, where a witness states that he heard a person say something which constitutes a part of the transaction (whether before, or at the time of, or after the main circumstance which is the subject of the action), and is explanatory of the nature of the transaction (e.g., that B., who struck A., used certain language, which showed he struck A. offensively, and not in play), such statement is admissible, to prove that such a thing was said; because, when so used, it is not derivative or second-hand evidence, but original evidence of a material fact, namely, that such a thing was said. (1 Rosc. 44; Best, 436-7.) **1561**

There are several exceptions to the rule excluding hearsay or second-hand evidence :—

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(1) Matters of public and general interest—such as the boundaries of counties or parishes, rights of common, claims of highway, &c.—may be proved by common reputation, and even by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject, if such declarations were made before any controversy arose. Hearsay evidence is here admitted because other evidence is not easily obtainable, and the evidence given is presumably true from the difficulty and unlikelihood of misrepresentation. The exception is, however, confined to matters of public interest, and does not extend to merely private rights. (Best, 438-9 ; 1 Rose. 48-51 ; *Lord Dunraven v. Llewellyn*, L. R. 15 Q. B. 791.) **1562**

Evidence on matters of public and general interest, by declarations of deceased persons, &c.

(2) As evidence of ancient possession, on the ground of necessity, hearsay evidence even of private rights is allowed, if contained in documents thirty years old, which come from proper custody (i. e., have been found in a place in which they might naturally and reasonably be expected to be found), and which are a part of the transaction to which they relate, and not a mere narrative of them. **1563**

Evidence of ancient possession.

(3) Matters of pedigree may be proved by declarations of deceased persons connected by blood or marriage with the family, if made before any controversy arose, and not made by the declarant obviously in his own interest ; by the general reputation of a family, proved by a surviving member of it ; by entries in books made by members of the family ; by correspondence between them ; by recitals and descriptions in deeds and wills, inscriptions, genealogies, &c. The relationship of the declarant must first be established,

Evidence of pedigree, by such declarations, &c.

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and it is for the judge to decide whether this has been done. But *primâ facie* proof will be sufficient. (Best, 439-40; 1 Rosc. 44-8; *Berkeley Peerage Case*, 4 Camp. 401.) **1564**

Evidence of
birth and
death by such
declarations.

Upon an application for a grant of administration to the personal estate of a deceased person, as to the date of whose birth and death, and as to whose christian name no positive evidence was forthcoming, its birth and death were allowed to be proved by evidence of declarations of its deceased mother. (*In the Goods of Thompson*, 12 P. D. 100.) **1565**

Hearsay evidence is admitted in matters of pedigree, because of the difficulty of obtaining other proof, and because it comes from persons most likely to be acquainted with the truth. Evidence of this kind is received in questions of pedigree only; thus it is inadmissible to support a defence of infancy to a claim for a debt. (*Haines v. Guthrie*, 13 Q. B. D. 818.) But pedigree includes proof of specific dates. **1566**

Declarations
of deceased
persons
against their
interest.

(4) Declarations made, *ante litem motam*, by deceased persons who had no interest to pervert the facts, and made them against their pecuniary or proprietary interest, are receivable in evidence in proceedings against third parties. (Best, 440-1; *The Queen v. Exeter*, L. R. 4 Q. B. 341.) **1567**

Thus, in *Higham v. Ridgway* (10 East, 109; 2 Sm. L. C. 317), an entry made by a man-midwife, who had delivered a woman of a child, of his having done so on a certain day, and referring to his ledger, in which he had made a charge for his attendance, and marked it as paid, was held to be evidence, after the death of the midwife, of the age of the child. **1568**

A declaration against interest is evidence of everything stated in the declaration, and the declaration need

not be contemporaneous with the events recorded therein; but the statement must be against pecuniary or proprietary interest, and therefore a declaration as to the marriage of the Duke of Sussex, made by the deceased clergyman who performed the ceremony, was held inadmissible, although the unlawful celebration of the marriage might have subjected him to a prosecution, and he therefore had an interest in being silent concerning the matter. (*Sussex Peerage Case*, 11 Cl. & F. 85; Best, 440-1; Powell, 214-25.) **1569**

(5) Contemporaneous declarations made in and forming part of the regular course of business by deceased persons, who had a personal knowledge of the facts and no interest in misrepresenting the truth, are admissible in evidence. (Best, 441; 1 Rosc. 55-9.) **1570**

Declarations
of deceased
persons made
in course of
business.

Such declarations are admitted because *primâ facie* deserving of credibility. Thus, in *Price v. Earl of Torrington* (2 Sm. L. C. 310), an action by a brewer for beer delivered, evidence was given that it was the custom in the plaintiff's business for the draymen to set their names every night to an entry showing the beer they had delivered. The drayman who, it was alleged, had delivered the beer to the defendant, was dead, but his handwriting was proved to an entry in the book, and it was held good evidence of delivery. The admissibility of such evidence is confined strictly to the particular thing which it was the duty for the person to do, and does not extend to collateral matters; and the declaration must have been made contemporaneously with the acts to which they relate. An entry or declaration made by a person in the course of business, but not under any duty to make the entry, is not admissible under this head. (Powell, 226-36.)

1571

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TIT. II.

Evidence of
general repu-
tation.

Evidence of general reputation and general character is original evidence, and not hearsay. Thus, general reputation is admissible to prove marriage, except in prosecutions for bigamy and petitions for damages for adultery under the Divorce Act, in which cases the marriage must be strictly proved. (Powell, 167.)

1572

Opinions of
witnesses.

The opinions of witnesses are not in general admissible as evidence. But in matters of science, skill, trade, and peculiar knowledge, experts (that is, persons conversant with the subject) are often required to give their opinions upon facts admitted or proved; and the opinion of a witness may be asked on a question of identification, and as to the apparent condition of a thing or demeanour of a party, when that is in question. (Best, 465-72; 1 Rosc. 174-5.) **1573**

Foreign law.

Foreign law must be proved by the evidence of professional or official persons. (Powell, 339.) **1574**

Self-serving
and self-
harming (or
disserving)
evidence.

Self-serving evidence is not in general admissible; for it is a general rule that a man shall not be allowed to make evidence for himself; so that nothing said or done by a person who has an interest at the time will be evidence either for him or those who claim under him. But self-harming (sometimes called self-disserving) statements, usually termed admissions, are ordinarily receivable in civil cases. (Best, 477-85; 1 Rosc. 62-76.) **1575**

Where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider any self-serving statements it contains. **1576**

Admissions may be by words, writing, signs or silence; but a promise to marry cannot be inferred merely from the fact that letters alleging such promise

are left unanswered by the defendant. (*Wiedemann v. Walpole*, (1891) 2 Q. B. 539.) **1577**

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TIT. II.

Admissions are judicial or extra-judicial according as they are made in the course of a judicial proceeding or in any other circumstances. **1578**

Admissions may be made either by a party himself, or by those under whom he claims, or by his agent when acting within the scope of his authority. (*Slatterie v. Pooley*, 6 M. & W. 664; 17 & 18 Vict. c. 125, s. 26.) **1579**

An admission cannot be given in evidence against a party who has made it with a declaration intimating that it is "without prejudice," nor can the answers to to such a communication even though not guarded by similar words. But when an offer is made in a letter, written "without prejudice," and such offer is accepted, the letter can be used in evidence against the writer. (Powell, 303-4; *Ex parte Holt*, *In re Daintrey*, (1893) 2 Q. B. 116.) **1580**

Admission
without
prejudice.

Admissions are not conclusive, but can be rebutted, unless they take the form of estoppels. An estoppel is an admission which the party whom it affects cannot controvert. Estoppels are of three kinds—(1) by matter of record; (2) by deed; (3) by matter in pais. (Powell, 246, 249.) **1581**

Estoppels.

The most important form of estoppel, by matter of record, is estoppel by judgment. A judgment in rem (e.g., as to status) is binding on all the world, and on the tribunals of all countries, except in the case of fraud or manifest error, or when the judgment was given by a foreign court and is contrary to natural justice. A judgment in personam is conclusive only between the parties and their privies. The thing and person must be the same, and there must be no fraud.

Judgments.

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TIT. II.

(Powell, 249-51; *Duchess of Kingston's Case*, 2 Sm. L. C. 713; *Ex parte Kibbel*, L. R. 10 Ch. 373.) **1582**

Foreign
judgments.

Foreign judgments are conclusive when given by a competent court, unless fraud can be shown, or the foreign tribunal has wilfully refused to apply English law when by comity of nations it is applicable. (Powell, 258-61; Best, 490-3; 542-7.) **1583**

Deeds.

A person cannot deny the truth of a statement in a deed if he is a party or privy to it; but he can show that the deed is void by reason of fraud, duress, or illegality, or because it was executed when he was a minor. Privies are by law (e.g., executors); by blood (e.g., heirs); or by estate (e.g., purchasers and donees). (Powell, 247, 263.) **1584**

Estoppels by
matter in
pais.

“Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is precluded from averring, against the latter, a different state of things as existing at the same time.” (*Pickard v. Sears*, 6 A. & E. 469, 474; *Low v. Bouverie*, (1891) 3 Ch. 82.) Thus, when a retiring partner omits to inform his customers of the fact that the continuing partners are no longer authorized to act as his agents, he is bound by all contracts made by them with third parties on the faith of their being so authorized. (Best, 495-8; Powell, 264-76.) **1585**

An agent is estopped from denying the title of his principal, and a tenant from denying that of his landlord. **1586**

How much
evidence is
requisite.

In civil cases, subject to the rules as to the burden of proof, a mere preponderance of probability is a sufficient ground of decision; and slight evidence uncontradicted may become cogent proof. (Best, 76.) **1587**

The testimony of a single witness is sufficient in civil cases. But in actions for breach of promise of marriage the plaintiff cannot recover a verdict unless his or her testimony is corroborated by some other material evidence. (32 & 33 Vict. c. 68, s. 2.) In actions for seduction the evidence of the woman must be corroborated. A claim against the estate of a deceased person should generally be corroborated by further evidence than that of the claimant. In the above cases the additional evidence required need not be a second witness, but may be in the form of conduct or letters, and so forth. The fact of the defendant not answering letters written by the plaintiff, in which she stated he had promised to marry her, is not corroborative evidence of the promise alleged. (*Wiedemann v. Walpole*, (1891) 2 Q. B. 534.) Where an instrument is subscribed by several witnesses, it is generally sufficient to call one. (Best, 551, 569; Powell, 52-3, 55-7.)

PART III.
TIT. II.

Sufficiency of
one witness.

1588

No one (except the Sovereign) is exempted by his position, however exalted, from giving evidence. (Best, 112.)

Duty to give
evidence.

1589

The attendance of a witness is enforced by a subpoena ad testificandum issued from the Central Office of the Supreme Court, and, if he is required to bring documents with him, by a subpoena duces tecum. If he disobey the writ, after having had tendered to him reasonable conduct money, he is liable to fine and imprisonment for contempt of Court, and the party calling him has a right of action against him for damages. If the witness is in civil custody a habeas corpus ad testificandum must be obtained; and if in criminal custody an order from the Secretary of State or a judge of the High Court. Where a witness is beyond the jurisdic-

Attendance of
witnesses.

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TIT. II.

Privileged
witnesses and
communica-
tions.

Evidence
against public
policy.

Privileged
communica-
tions.

tion of the Court, his evidence can be taken by means of a commission. (Powell, 492-4, 504-6.) **1590**

A witness, though competent, is not compelled or permitted to testify as to certain subjects. **1591**

(1) Thus some evidence is excluded on the ground of public policy, as tending to the public detriment, such as secrets of state, names of informers, and so forth. (Best, 529-31; 1 Rose. 171-2; *Beatson v. Skene*, 5 H. & N. 838.) **1592**

(2) As between a client and his counsel, or his solicitor, directly or through any other person, communications, deeds, papers, and documents are privileged from disclosure, unless the client, whose privilege the right to withhold them is, waives it. And so are communications made by a person to any other person, if for the purpose of, or with a view to, actual or impending litigation, unless waived by the litigant. But no such privilege exists as between patients and medical men, or as regards secrets disclosed in the ordinary course of business or friendship. It is doubtful whether or not communications made to a spiritual adviser are privileged. (Best, 531-2, 536; 1 Rose. 165-71.) **1593**

No presumption is to be made against the client on the ground of his insisting on this privilege. (*Wentworth v. Lloyd*, 10 H. L. C. 589.) **1594**

The solicitor must produce the documents of a client in his possession which the client would himself be bound to produce. (1 Rose. 155-6; *Bursill v. Tanner*, 16 Q. B. D. 1.) **1595**

Communications made by the client before the commission of a crime, for the purpose of being guided in the commission of it, are not privileged. (Best 531.) And if fraud is alleged against the defendant, communications between himself and his solicitor on the

subject matter of the alleged fraud are not privileged from production. (*Williams v. Quebreda Railway, Land, and Copper Co.*, (1895) 2 Ch. 751.) **1596**

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TIT. II.

(3) Communications between husband and wife are privileged. (Best, 535-6.) **1597**

Communica-
tion between
husband and
wife.

(4) Except in certain cases provided for by statute, a witness cannot be asked any question the answering which would have a tendency to expose him to a criminal prosecution or proceedings for a penalty or a forfeiture, unless by leave of the Court or Judge, and then only under peculiar circumstances. And if asked, he is not obliged to answer such a question. But a witness cannot refuse to answer a question on the ground that it may tend to show that he owes a debt, or is otherwise subject to a civil suit. (Best, 113-8; 1 Rosc. 166-8; 46 Geo. III. c. 37.) **1598**

Evidence
tending to
expose to a
prosecution,
penalty or
forfeiture.

If a witness refuse to answer a question, or a document is not produced, on the ground of privilege, secondary evidence thereof can be given, except in the case of evidence excluded on the ground of public policy. (*Chatterton v. Secretary of State for India*, (1895) 2 Q. B. 189.) **1599**

A person is incompetent to give evidence while non compos mentis. (Best, 130-5.) But the testimony of an infant of tender years is receivable, if he understands the nature and obligation of an oath and the consequences of perjury. The judge decides, on examination of the lunatic or child on the voir dire, as to his competency. (Best, 135-44; 1 Rosc. 161, 166.) **1600**

Persons in-
competent to
give evidence.

A person was formerly deemed to be incompetent to be a witness, for want of religious belief; but this objection has been removed. (Best, 144-53; 1 Rosc. 159-60; Oaths Act, 1888 (51 & 52 Vict. c. 46).) **1601**

PART III.
TIT. II.

(a) Evidence
of parties and
their wives.

Parties to any civil proceeding, and the husbands and wives of the parties or of the persons on whose behalf the action or proceeding may be brought, opposed, or defended, may be examined on behalf of either or any of the parties therein. (14 & 15 Vict. c. 99, ss. 2, 4; 16 & 17 Vict. c. 83, s. 1; 32 & 33 Vict. c. 68, ss. 2, 3.) But husbands and wives are not compellable to disclose any communication by the one to the other during the marriage. (Best, 159-60; 16 & 17 Vict. c. 83, s. 3.)

1602

Crime is not now a ground of incompetency. (Best, 128; 1 Rose. 164; 6 & 7 Vict. c. 85.) **1603**

Evidence of
persons
having a
pecuniary
interest, or
those who are
connected.

Pecuniary interest is not now a ground of incompetency to be a witness. (1 Rose. 161.) Interest affects the credit but not the competency of a witness. (Best, 128-9; 6 & 7 Vict. c. 85; 14 & 15 Vict. c. 99, s. 1; 16 & 17 Vict. c. 83, s. 4.) **1604**

Burden of
proof.

The general rule is that the burden of proof lies on the party who would fail if no evidence, or no further evidence, were given. It, therefore, lies on the party who asserts that which virtually constitutes the affirmative of the issue or question in dispute, though it may not be an affirmative in form, or may involve a negative: so that the party who denies the virtual affirmative need not give evidence in support of such denial, until the party asserting the affirmative has at least laid some probable grounds for belief of it. Where a presumption is in favour of the party asserting the affirmative, the burden of proof shifts. Thus, in an action for goods supplied, where the defendant pleads infancy, the onus of proof lies upon the defendant, as the law presumes

(a) In criminal proceedings a person accused of the crime cannot give evidence on his own behalf, nor can the wife or husband of a person accused; but the rule is subject to many exceptions.

that when a man contracts he is of proper age to contract until the contrary be shown. (Powell, 322-30; Best, 260-8; 1 Rosc. 94-6.) **1605**

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In an action for damage for injury caused by negligence, the onus of proving both the negligence, and also that the negligence was connected with and materially contributed to the injury, rests upon the plaintiff; and the onus of proving affirmatively that there was contributory negligence on the part of the person injured, rests, in the first instance, upon the defendant, and in the absence of evidence tending to that conclusion, the plaintiff is not bound to prove the negative. (*Wakelin v. London and South Western Rail. Co.*, 12 App. Cas. 41.) **1606**

Negligence.

Contributory
negligence.

But in every case the burden of proof lies on the person who wishes to support his case by a particular fact which is peculiarly within his own knowledge; and in some cases the burden of proof is cast on the opposite party by statute. (Best, 260-8; Powell, 330.) **1607**

The party on whom the onus probandi lies begins the case; but the plaintiff must, in any case, begin in actions for libel, slander, injuries to the person, and other actions for unliquidated damages—for here the question of damages at any rate must go to the jury; and in practice, for convenience, the plaintiff begins in most cases. (Best, 587-90; Powell, 332-3.) **1608**

Right to
begin.

If a plaintiff succeed, it must be by the strength of his own right and the clearness of his own proof, and not through the want of right or the weakness of proof on the part of his adversary. (Best, 260.) **1609**

Plaintiff must
prevail by the
strength of
his own case.

Evidence must correspond with the allegations brought forward in the case presented. It is sufficient if only the substance of the issue is proved, but the case proved must be substantially the same as that stated in the record. (Best, 271-4; 1 Rosc. 90.) **1610**

Substance of
issue must be
proved.

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TIT. II.

What evidence may be rejected as irrelevant ;

or unnecessary.

Admission by a married woman or a guardian.

Evidence of character of the parties.

Amendment of pleadings is now freely allowed. (R. S. C., Ord. XXVIII. r. 1.) **1611**

Evidence may be rejected as irrelevant, when it does not concern the relative conduct of the contending parties, but that of one of them and a third person not a party ; or when it is not pertinent to the issue either directly or indirectly, nor tends to increase or diminish the damages ; or when the connection between the fact to be proved and the evidentiary facts is too remote and conjectural ; or when the evidence is not relevant to the pleadings or written statements which the parties have made to enable the tribunal to see the points in dispute. Acts unconnected with the act in question are receivable to prove the intent of the parties in certain cases, and to prove custom of trade. Evidence is unnecessary when the facts have been admitted by the party, or his counsel, solicitor, agent, or partner, or by some one under whom he claims, on the record or otherwise, or decided by a verdict in an action between the same parties, or are noticed by the Courts, *ex officio*, or deemed notorious or presumed. An admission by a wife, however, will not bind her husband, unless she can be deemed to be his agent ; nor will an admission by a guardian bind the infant. (Best, 241-51 ; 1 Rosc. 84.) **1612**

Evidence of the character of the parties is generally irrelevant and inadmissible in civil cases, unless it is of the substance of the issue. Thus, in an action for seduction, the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct or proof of particular acts of it. In an action for libel, evidence of the plaintiff's general bad character can be given in mitigation of damages, but evidence of rumours against the plaintiff

is too remote, and is inadmissible. (1 Rosc. 87; Best, 244-8; *Scott v. Sampson*, L. R. 8 Q. B. 491.) **1613**

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TIT. II.

The credit of a witness is always in issue, and accordingly general evidence is receivable to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath. Formerly, although the witness might be questioned as to particular facts showing bad conduct, he was not always bound to answer, and, if he did, his answer was conclusive. With regard to previous convictions, however, the law has now been altered by 17 & 18 Vict. c. 125, s. 25, which enacts that a witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and if he deny the fact, or refuse to answer, it shall be lawful for the opposite party to prove such conviction; and a certificate containing the substance and effect only of the indictment and conviction for such offence, purporting to be signed by the clerk of the Court, or other proper officer, shall, upon proof of the identity of the person, be sufficient evidence of the said conviction. (Best, 249-58.) **1614**

Character of
witnesses.

The Court takes judicial notice of numerous facts which it is therefore unnecessary to prove, e.g., public statutes, the Court's own course of procedure and practice, the political constitution of our own government, the existence and titles of other sovereign powers. (Powell, 334.) **1615**

Judicial
notice.

A presumption is an inference as to a disputed fact drawn from the proof or assumption of a collateral fact. (Powell, 72.) Presumptions may be of fact, or of law, or of mixed law and fact. Presumptions of fact (or *presumptiones hominis*) are divided into slight or strong, according as they are, or are not, of sufficient weight to shift the burden of proof. (Best, 297.) Presumptions

Presumption

PART III.
TIT. II.

of fact (e. g., circumstantial evidence) are rebuttable, and, even if not rebutted, are not conclusive. Presumptions of law are of two kinds : *presumptiones juris et de jure*, which are irrebuttable ; and *presumptiones juris*, which are rebuttable, but, if not rebutted, are conclusive. (Best, 288-9.) **1616**

Presump-
tiones juris
et de jure.

A receipt under hand and seal is conclusive evidence of the payment of money. (Best, 288.) **1617**

If a voluntary gift is made to a solicitor or his wife by a client of the solicitor, who had no independent advice on the point, the presumption that such a gift was made under undue influence is absolute, and cannot be rebutted by evidence to the contrary. (*Liles v. Terry*, (1895) 2 Q. B. 679.) **1618**

It is presumed conclusively, that all persons are acquainted with the law ; or, rather, ignorance of law is no defence to legal liability. (Best, 318.) **1619**

Presump-
tiones juris.

Instances of *presumptiones juris* (rebuttable, but conclusive if not rebutted) are the presumption that a child born during wedlock is legitimate ; the presumptions in favour of innocence (whether the guilt of the party comes in question directly or collaterally) and sanity, and against fraud ; and the presumption that every person intends the natural consequences of his acts. (Best, 293, 324.) **1620**

Presumption
of that which
is usual.

In many cases acts are presumed to be in accordance with the ordinary conduct of mankind, the habits of society, and the usages of trade, where there is no reason to suppose the contrary. (Best, 360-3.) **1621**

Presumption
of that which
is right.

Where an instrument or act is susceptible of two constructions, the one involving that which is legal, and the other that which is illegal, the parties will be presumed to have intended the former. And persons are presumed to have acted rightly : so that non-

performance of duty, irregularity, illegality, fraud, perjury, or other vice, misconduct, or wrong, is not to be presumed. (Best, 325-30; 1 Rose. 43-4.) Hence, no person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction. (Best, 259-61.) And, on the same principle, the Courts are inclined to dispense with proof of circumstances which are essential to the validity of official and other acts, and by which they were probably accompanied in some instances. Thus, prior acts are sometimes inferred from posterior acts, and posterior acts from prior acts, and intermediate acts from antecedent and subsequent acts. (Best, 330-6; 1 Rose. 43-4.) **1622**

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Possession, or quasi possession, or user, or receipt of rent from the person in possession, as the case may be, is *primâ facie* evidence of property. (Best, 337-60; 1 Rose. 38; *Asher v. Whitlock*, L. R. 1 Q. B. 1, 7.)

Presumption
from possession
or
receipt of
rent.

1623

Ancient documents (i.e., more than thirty years old), proved to have come from the proper custody, and purporting to be a part of the transactions to which they relate, are evidence of those transactions. (Best, 440; 1 Rose. 102-3.) **1624**

Evidence
from ancient
documents.

The posting of a letter is *primâ facie* proof of its receipt in due time. But it is not conclusive, unless made so by statute. (Best, 362; 1 Rose. 43.) **1625**

Presumption
of receipt of
a letter.

Any considerable and unnecessary lapse of time, without demand of payment, and without any acknowledgment of the existence of a debt, affords *primâ facie* presumption of payment. (1 Rose. 36-7.) **1626**

Presumption
of payment.

The presumption, in the absence of evidence to the contrary, is in favour of the continuance of things in the

Presumption
of continuance
of the same

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TIT. II.

state of
things.

Presumption
of marriage.

Presumption
with reference
to life or
death.

Presumption
as to stamp.

Alterations.

Conflicting
presumptions.

same state in which they are proved to have existed.
(Best, 363-8; 1 Rosc. 34.) **1627**

Cohabitation as man and wife gives rise to the presumption of marriage until the contrary be proved; and where the form of marriage has been gone through, the requisites of a valid marriage are presumed, until proof to the contrary. (Best, 328; 1 Rosc. 34 (a).) **1628**

There is no presumption of law in favour of the continuance of life, though there may be grounds for inferring it. But when a person goes abroad, or leaves his usual place of resort, and has not been heard of for seven years, there is a presumption of mixed law and fact that he is dead; but none as to the time of death. Where several persons perish together there is no artificial presumption as to which perished first. (Best, 366-9; 1 Rosc. 41-2; *In re Lewes' Trusts*, L. R. 6 Ch. Ap. 356; *Wing v. Angrave*, 8 H. L. C. 183.) **1629**

In the absence of evidence to the contrary, a document which is lost or not produced on notice, will be presumed to have been duly stamped. So that the burden of proof as to the stamp is on the party who alleges the instrument to have been unstamped to establish that fact. But if there is evidence that at a particular time the instrument was unstamped, the burden of proof is shifted to the party who alleges that it was stamped to prove that fact. (*The Marine Investment Co. v. Haviside*, L. R. 5 H. L. 624; Best, 212; 1 Rosc. 220.) **1630**

Alterations in deeds are presumed to have been made before execution. In the case of wills the presumption is that an alteration was made after execution. (Powell, 90.) **1631**

Rebuttable presumptions of any kind may be encoun-

(a) This would not be the case in a prosecution for bigamy, where the conflicting and stronger presumption of innocence prevails.

tered by presumptions, as well as by direct evidence. PART III.
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The relative weight of conflicting presumptions of law is to be determined by the Court or a judge. **1632**

Public documents are acts of public functionaries in judicial, legislative, and administrative functions of government, e.g., Acts of Parliament, judgments, proclamations, and the like. (Best, 201.) Acts of Parliament are proved by citation, and reference to any recognized edition of the statutes (52 & 53 Vict. c. 63, s. 9); records of the Court by certified or examined copies. **1633**

Proof of
public and
private docu-
ments.

Among private writings, the most important are those which come under the description of deeds. The execution of a deed, if attestation was necessary, must be proved by at least one of the attesting witnesses, notwithstanding the testimony of third persons or an admission of the party by whom it was executed, except it be a formal admission made *inter partes* for the purpose of the trial. If an attesting witness is satisfied as to his signature, and says he is therefore sure he saw the instrument executed, recollection of the execution is not necessary. If the witnesses are dead, or insane, or out of the jurisdiction of the Court, or cannot be found, proof may be given of their handwriting. (Best, 202-3; 1 Rose. 131-6.) **1634**

Proof of
deeds, wills,
and other
documents.

Documents attested, but not requiring attestation, may be proved as if not attested. (1 Rose. 131; Best, 203.) **1635**

Where there is no attesting witness to an instrument, it is usually proved by evidence of the handwriting of the party. (Best, 204.) **1636**

A probate is evidence of the validity and contents of a will of personal estate. (1 Rose. 117-8, 141.) It was formerly necessary to produce the original will in

PART III.
TIT. II.

the case of an action involving the title to lands; but now, by the stat. 20 & 21 Vict. c. 77, s. 64, a devise of real estate may be proved by the probate or a sealed office copy from the Probate Division of the High Court. In this case the person tendering the evidence must give ten days' notice before trial to the other party, who may, in four days after receipt of such notice, give a counter-notice that he disputes the validity of the devise, and that the original will must be produced. Even in the absence of a counter-notice, the probate is only *primâ facie* evidence. (Powell, 364-5.) If a will is proved in solemn form (i. e., by calling the witnesses to it in open Court), the probate is conclusive proof. By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 3, probate may be granted in respect of real estate only, although there is no personal estate. But the expression "real estate" in this part of the Act shall not be deemed to include copyholds, except in special cases. (Sub-sect. 4.) **1637**

No proof is required of a deed, will or other document more than thirty years old, and coming from a custody in which it was not unreasonable to expect to find it, though it might not be the most proper custody. But if attested, the opposite party may call the attesting witness to show that it was not duly executed. (Best, 203; 1 Rose. 140-7.) **1638**

How judgment as to handwriting may be formed.

Judgment as to the genuineness of handwriting may be formed from having seen the person write on former occasions; or from having corresponded with him, or had other opportunities of seeing his handwriting; or from a comparison of the handwriting in question with other documents proved to have been written or signed by him. (Best, 225-38; 1 Rose. 138-40.) **1639**

Right to have context read.

Where part of a document or statement is used

against a person, he has a right to have the whole of it laid before the Court, so far as it bears upon the part so used. (1 Rosc. 79, 179.) **1640**

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TIT. II.

Either party, in a civil proceeding in the Superior Courts, is entitled to an inspection of documents in the possession of the opposite party, which relate to his own case alone, or to the cases of both parties conjointly, and to take copies of such documents. (Best, 577-8; 1 Chit. Arch. 505-7.) **1641**

Right to inspect and copy documents.

The Court or a judge may, during the pendency of any proceeding, order discovery on oath, or production by any party of the documents in his possession or power relating to the matter in question, and deal with them when produced as shall appear just. And interrogatories may be administered to obtain discovery. (1 Chit. Arch. 491, 507; Best, 577-8.) **1642**

Discovery.

When documents required as evidence are in the possession of the adverse party, a notice to produce them should be served on him; and if he does not produce them, secondary evidence of their contents may be given. If they are in the possession of a third person, he may be served with a subpoena duces tecum, i. e., a summons to attend the trial as a witness, and bring the documents with him. But a person need not produce documents, if the disclosure would involve a breach of professional confidence, or might subject him to a criminal prosecution, penalty or forfeiture, or loss of his estate or interest. So that a person or his solicitor need not produce the muniments of title to his estate, but secondary evidence of their contents may be given. (Best, 199; 1 Rosc. 154-5.) **1643**

Notice to produce documents.

Either party may call on the other party, by notice, to admit any document, saving all just exceptions; and in case of refusal or neglect to admit it, the costs of

Notice to admit documents.

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TIT. II.

proving the document must be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless the judge certifies that the refusal to admit it was reasonable. (Best, 579; 1 Rose. 73-5; Rules of the Supreme Court, 1883, Ord. XXXII. r. 2.)

1644

Notice to
admit facts.

Any party may, by notice in writing, at any time not later than nine days before trial, call upon any other party to admit, for the purposes of the cause or issue only, any specific fact or facts mentioned in the notice. And in case of refusal or neglect to admit the same within six days after notice, or within such further time as may be allowed, the costs of proving the facts must be paid by the party neglecting or refusing, whatever the result of the cause or issue may be, unless the judge certify that the refusal to admit was reasonable, or order otherwise. (1 Rose. 74; Rules of the Supreme Court, 1883, Ord. XXXII. r. 4.) **1645**

Admission by
pleadings or
otherwise.

Any party may give notice by his pleadings, or otherwise in writing, that he admits the truth of the whole, or any part, of the case of any other party. (1 Chit. Arch. 477; Rules of the Supreme Court, 1883, Ord. XXXII. r. 1.) **1646**

How far
extrinsic
evidence
admissible to
affect written
documents.

The general rule is that parol or extrinsic evidence (i. e., words or writing) is not admissible to contradict, add to, subtract from, or vary the terms of a written instrument. **1647**

But a written contract may be waived, and a new written or verbal contract substituted; and it is permissible to show by parol evidence that a written contract (under seal or not) never existed legally, or is void, because of fraud or undue influence. (Powell, 453-62; *Pattle v. Hornbrook*, (1897) 1 Ch. 25.) **1648**

Latent and

Extrinsic evidence is admissible to explain a *latent*

ambiguity, i. e., a difficulty in understanding the terms of a document, but not to explain a *patent* ambiguity, i. e., when an instrument is, on its face, unintelligible. The technical words of trade or custom, or an ambiguity in description, in a written document, can be explained by extrinsic evidence. Extrinsic evidence is also admissible to give evidence of usage, and to explain alterations in a written instrument. (Best, 208-11.)

PART III.
TIT. II.

patent
ambiguity.

1649

In civil cases, before a jury, the proceedings commence with a short statement to the jury, made by the junior counsel for the plaintiff, of the questions they are about to try. The party who has the right to begin (a question which is decided by the judge; see pars. 1605-8, above) then, by himself or his counsel, states his case to the jury, and adduces his evidence in support of it. The opposite party or his counsel is then heard. If he adduces evidence the opener has a right to address the jury in reply. If the opposite party calls no evidence he has the last word to the jury, but the party who begins may address the jury a second time at the close of his case. **1650**

Course of a
trial.

Every witness called is first examined by the party calling him; and this is denominated his examination in chief. The other party then has a right to cross-examine him; after which, the party by whom he is called may re-examine him, but only as to matters arising out of the cross-examination. (Best, 581-3.)

1651

Leading questions (i. e., questions which suggest the answer desired) are not allowed in examination in chief except (1) where they are merely introductory, (2) where the witness has forgotten the circumstances, (3) for the purpose of identifying persons or things, (4) where the

Leading
questions.

PART III.
TIT. II.

witness proves hostile to the party calling him. (Best, 591-3.) Leading questions are allowed in cross-examination unless the witness shows a bias in favour of the cross-examining party. **1652**

Discrediting
evidence of
adversary's
witness.

Relevant evidence only can be received, but the testimony of an adversary's witness can be discredited:—

- (1) by bringing forward counter-proofs and by cross-examination; (2) by giving evidence of his general bad character for untruthfulness, i. e., the evidence of persons who depose that they would not believe him on his oath. If the witness be cross-examined as to particular acts of misconduct his answer is conclusive, except that previous convictions can be proved; (3) by showing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause. It is enacted by 17 & 18 Vict. c. 125, s. 23, that if a witness upon cross-examination as to a former inconsistent statement does not admit that he has made such statement, proof may be given that he did, in fact, make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such a statement; (4) by proving misconduct, ~~un~~connected with the proceedings, such as that he has been bribed. (Best, 593-5.) **1653**

Right to
discredit own
witness.

By 17 & 18 Vict. c. 125, s. 22, a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case

the witness shall, in the opinion of the judge, prove adverse (i. e., in the sense that he exhibits a hostile mind, not merely that his testimony turns out to be unfavourable), contradict him by other evidence, or, by leave of the judge, prove that he has made former inconsistent statements; but the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. (Best, 595-7; Powell, 517-8.) **1654**

A witness has a right to refresh his memory by means of a document, if it were made by the witness, or recognised by him at the time, or shortly after the facts recorded happened, as a correct account. But counsel for the opposite side has the right to see such document and cross-examine upon it. An expert witness may refresh his memory by referring to scientific treatises for the purpose. (Powell, 406-11, 516.) **1655**

Refreshing
memory.

A witness must not be asked questions as to his personal opinion unless he is called as an expert witness, or on a question of identification. **1656**

Witness's
opinion.

The Court or judge is charged with the general conduct of the proceedings; he decides all questions of law and practice, including the admission and rejection of evidence, and sums up the case to the jury. He also decides whether there is any evidence to go to the jury. "Whether there is any evidence is a question for the judge; whether sufficient evidence is for the jury." (*Carpenters' Company v. Hayward*, 1 Dougl. 374, 375, per Buller, J.) Thus, in an action against an infant for goods supplied, it is for the judge to decide whether the goods are capable of being necessities, and for the jury to decide whether they are so in fact. The decision of the facts in issue is the exclusive province of

Functions of
judge and
jury.

PART III.
TIT. II.

the jury. Thus, when the defendant, in an action for malicious prosecution, gives evidence to prove reasonable and probable cause, it is for the jury to find the facts, and it is for the judge to decide, as a matter of law, whether the facts proved amount to reasonable and probable cause; but facts on which the admissibility of evidence depends are determined by the judge, and not by the jury. (Best, 63-4; Powell, 10-25.) **1657**

APPENDIX.

43 & 44 VICT. c. 42.

An Act to extend and regulate the Liability of Employers to make Compensation for Personal Injuries suffered by Workmen in their service. 43 & 44 VICT.
c. 42.

[7th September, 1880.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. Where after the commencement of this Act personal injury is caused to a workman— Amendment
of law.

- (1.) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or
- (2.) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or
- (3.) By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or
- (4.) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or

43 & 44 VICT.
c. 42.

- (5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Exceptions to
amendment
of law.

2. A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases: that is to say,

- (1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.
- (2.) Under sub-section-four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw.
- (3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Limit of sum
recoverable as
compensation.

3. The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

4. An action for the recovery under this Act of compensation for an injury shall not be maintainable unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: Provided always, that in case of death the want of such notice shall be no bar to the maintenance of such action if the judge shall be of opinion that there was reasonable excuse for such want of notice.

43 & 44 VICT.
c. 42.

Limit of time
for recovery of
compensation.

5. There shall be deducted from any compensation awarded to any workman, or representatives of a workman, or persons claiming by, under, or through a workman in respect of any cause of action arising under this Act, any penalty or part of a penalty which may have been paid in pursuance of any other Act of Parliament to such workman, representatives, or persons in respect of the same cause of action; and where an action has been brought under this Act by any workman, or the representatives of any workman, or any persons claiming by, under, or through such workman, for compensation in respect of any cause of action arising under this Act, and payment has not previously been made of any penalty or part of a penalty under any other Act of Parliament in respect of the same cause of action, such workman, representatives, or persons shall not be entitled thereafter to receive any penalty or part of a penalty under any other Act of Parliament in respect to the same cause of action.

Money pay-
able under
penalty to be
deducted from
compensation
under Act.

6.—(1.) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed.

Trial of
actions.

(2.) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

(3.) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

43 & 44 Vict.
c. 42.

“County court” shall, with respect to Scotland, mean the “Sheriff’s Court,” and shall, with respect to Ireland, mean the “Civil Bill Court.”

40 & 41 Vict.
c. 50.

In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries.

Mode of
serving notice
of injury.

7. Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.

Definitions.

8. For the purposes of this Act, unless the context otherwise requires,—

The expression “person who has superintendence entrusted to him” means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour :

The expression "employer" includes a body of persons corporate or unincorporate: 43 & 44 Vict. c. 42.

The expression "workman" means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. 38 & 39 Vict. c. 90.

9. This Act shall not come into operation until the first day of January one thousand eight hundred and eighty-one, which date is in this Act referred to as the commencement of this Act. Commencement of Act.

10. This Act may be cited as the Employers' Liability Act, 1880, and shall continue in force till the thirty-first day of December one thousand eight hundred and eighty-seven, and to the end of the then next session of Parliament, and no longer, unless Parliament shall otherwise determine, and all actions commenced under this Act before that period shall be continued as if the said Act had not expired. Short title.

60 & 61 VICT. c. 37.

An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment.

[6th August, 1897.]

60 & 61 VICT.
c. 37.

Liability of
certain em-
ployers to
workmen for
injuries.

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1.) If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

(2.) Provided that:—

- (a.) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed;
- (b.) When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid;
- (c.) If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall be disallowed.

(3.) If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the employment is one to which this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.

60 & 61 Vict.
c. 37.

(4.) If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act.

In any proceeding under this subsection, when the Court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.

(5.) Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines or factories, or the application of any such fine, but if any such fine, or any part thereof, has been applied for the benefit of the person injured, the amount so applied shall be taken into account in estimating the compensation under this Act.

2.—(1.) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death. Provided always that the want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings, if it is found in the proceedings for settling the claim that the employer is not prejudiced in his

Time for
taking
proceedings.

60 & 61 VICT.
c. 37.

defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake or other reasonable cause.

(2.) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3.) The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

(4.) The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business, and if served by post shall be deemed to have been served at the time when the letter containing the same would have been delivered in the ordinary course of post, and in proving the service of such notice it shall be sufficient to prove that the notice was properly addressed and registered.

(5.) Where the employer is a body of persons corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to the employer at, the office, or, if there be more than one office, any one of the offices of such body.

Contracting
out.

3.—(1.) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, is on the whole not less favourable to the general body of workmen and their dependants than the provisions of this Act, the employer may, until the certificate is revoked, contract with any of those workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

(2.) The registrar may give a certificate to expire at the end of a limited period not less than five years.

(3.) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring.

60 & 61 VICT.
c. 37.

(4.) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the provisions of any scheme are no longer on the whole so favourable to the general body of workmen of such employer and their dependants as the provisions of this Act, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the registrar shall examine into the complaint, and, if satisfied that good cause exists for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5.) When a certificate is revoked or expires any moneys or securities held for the purpose of the scheme shall be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6.) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7.) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

4. Where, in an employment to which this Act applies, the undertakers as hereinafter defined contract with any person for the execution by or under such contractor of any work, and the undertakers would, if such work were executed by workmen immediately employed by them, be liable to pay compensation under this Act to those workmen in respect of any accident arising out of and in the course of their employment, the undertakers shall be liable to pay to any workman employed in the execution of the work any compensation which is payable to the workman (whether under this Act or in respect of personal negligence or wilful act independently of this Act) by such contractor, or would be so payable if such contractor were an employer to whom this Act applies.

Sub-con-
tracting.

Provided that the undertakers shall be entitled to be indemnified by any other person who would have been liable independently of this section.

This section shall not apply to any contract with any person for the execution by or under such contractor of any work which

60 & 61 VICT.
c. 37. is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively.

Compensation to workmen in case of bankruptcy of employer. 5.—(1.) Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and the judge of the county court may direct the insurers to pay such sum into the Post Office Savings Bank in the name of the registrar of such court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in the Post Office Savings Bank of any sum allotted as compensation, and those provisions shall apply accordingly.

(2.) In the application of this section to Scotland, the words “have a first charge upon” shall mean “be preferentially entitled to.”

Recovery of damages from stranger. 6. Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the workman may, at his option, proceed, either at law against that person to recover damages, or against his employer for compensation under this Act, but not against both, and if compensation be paid under this Act, the employer shall be entitled to be indemnified by the said other person.

Application of Act and definitions. 7.—(1.) This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a railway, factory, mine, quarry, or engineering work, and to employment by the undertakers as hereinafter defined on in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof.

(2.) In this Act—

“Railway” means the railway of any railway company to which the Regulation of Railways Act, 1873, applies, and includes a light railway made under the Light Railways Act, 1896; and “railway” and “railway

36 & 37 Vict.
c. 48.

59 & 60 Vict.
c. 48.

company" have the same meaning as in the said Acts of 1873 and 1896: 60 & 61 Vict. c. 37.

"Factory" has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, and every laundry worked by steam, water, or other mechanical power: 58 & 59 Vict. c. 37.

"Mine" means a mine to which the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, applies: 50 & 51 Vict. c. 58. 35 & 36 Vict. c. 77.

"Quarry" means a quarry under the Quarries Act, 1894: 57 & 58 Vict. c. 42.

"Engineering work" means any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer, and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used:

"Undertakers" in the case of a railway means the railway company; in the case of a factory, quarry, or laundry means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895; in the case of a mine means the owner thereof within the meaning of the Coal Mines Regulation Act, 1887, or the Metalliferous Mines Regulation Act, 1872, as the case may be, and in the case of an engineering work means the person undertaking the construction, alteration, or repair; and in the case of a building means the persons undertaking the construction, repair, or demolition:

"Employer" includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer:

"Workman" includes every person who is engaged in an employment to which this Act applies, whether by way of manual labour or otherwise, and whether his agreement is one of service or apprenticeship or otherwise, and is expressed or implied, is oral or in writing. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants, or other person to whom compensation is payable:

"Dependants" means—

(a) In England and Ireland, such members of the workman's family specified in the Fatal Accidents Act, 9 & 10 Vict. c. 93.

60 & 61 Vict.
c. 37.

1846, as were wholly or in part dependent upon the earnings of the workman at the time of his death; and

- (b) In Scotland, such of the persons entitled according to the law of Scotland to sue the employer for damages or solatium in respect of the death of the workman, as were wholly or in part dependent upon the earnings of the workman at the time of his death.

(3.) A workman employed in a factory which is a shipbuilding yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard.

Application
to workmen
in employ-
ment of
Crown.

8.—(1.) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to any employment by or under the Crown to which this Act would apply if the employer were a private person.

50 & 51 Vict.
c. 67.

(2.) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame a scheme with a view to its being certified by the Registrar of Friendly Societies under this Act.

Provision as
to existing
contracts.

9. Any contract existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act.

Commence-
ment of Act
and short
title.

10.—(1.) This Act shall come into operation on the first day of July one thousand eight hundred and ninety-eight.

(2.) This Act may be cited as the Workmen's Compensation Act, 1897.

SCHEDULES.

FIRST SCHEDULE.

Sects. 1, 5.

SCALE AND CONDITIONS OF COMPENSATION.

Scale.

- (1.) The amount of compensation under this Act shall be—
 - (a) Where death results from the injury—
 - (i.) If the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act shall be deducted from such sum, and if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer;
 - (ii.) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings at the time of his death, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants; and
 - (iii.) If he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds;
 - (b) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound.

60 & 61 VICT.
c. 37.

(2.) In fixing the amount of the weekly payment, regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident and the average amount which he is able to earn after the accident, and to any payment not being wages which he may receive from the employer in respect of his injury during the period of his incapacity.

(3.) Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and any proceeding under this Act in relation to compensation, shall be suspended until such examination takes place.

(4.) The payment shall, in case of death, be made to the legal personal representative of the workman, or, if he has no legal personal representative, to or for the benefit of his dependants, or, if he leaves no dependants, to the person to whom the expenses are due; and if made to the legal personal representative shall be paid by him to or for the benefit of the dependants or other person entitled thereto under this Act.

(5.) Any question as to who is a dependant, or as to the amount payable to each dependant, shall, in default of agreement, be settled by arbitration under this Act.

(6.) The sum allotted as compensation to a dependant may be invested or otherwise applied for the benefit of the person entitled thereto, as agreed, or as ordered by the committee or other arbitrator.

(7.) Any sum which is agreed or is ordered by the committee or arbitrator to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(8.) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings bank, and the declaration to be made by a depositor, shall not apply to such sums.

(9.) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act shall be paid out, except upon authority addressed

to the Postmaster-General by the Treasury or by the judge of the county court. 60 & 61 Vict.
c. 37.

(10.) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

(11.) Any workman receiving weekly payments under this Act shall, if so required by the employer, or by any person by whom the employer is entitled under this Act to be indemnified, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, or such other person; but if the workman objects to an examination by that medical practitioner, or is dissatisfied by the certificate of such practitioner upon his condition when communicated to him, he may submit himself for examination to one of the medical practitioners appointed for the purposes of this Act, as mentioned in the Second Schedule to this Act, and the certificate of that medical practitioner as to the condition of the workman at the time of the examination shall be given to the employer and workman, and shall be conclusive evidence of that condition. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(12.) Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

(13.) Where any weekly payment has been continued for not less than six months, the liability therefor may, on the application by or on behalf of the employer, be redeemed by the payment of a lump sum, to be settled, in default of agreement, by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator to be invested or otherwise applied as above mentioned.

(14.) A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

60 & 61 Vict.
c. 37.

(15.) Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

59 & 60 Vict.
c. 25.

(16.) In the application of this schedule to Scotland the expression "registrar of the county court" means "sheriff clerk of the county," and "judge of the county court" means "sheriff."

40 & 41 Vict.
c. 56.

(17.) In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

Sect. 1.

SECOND SCHEDULE.

ARBITRATION.

The following provisions shall apply for settling any matter which under this Act is to be settled by arbitration :—

(1.) If any committee, representative of an employer and his workmen exist with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects, by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2.) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within three months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the county court judge, according to the procedure prescribed by rules of court, or if in England the Lord Chancellor so authorizes, according to the like procedure, by a single arbitrator appointed by such county court judge.

(3.) Any arbitrator appointed by the county court judge shall, for the purposes of this Act, have all the powers of a county court judge, and shall be paid out of moneys to be provided by Parliament in accordance with regulations to be made by the Treasury.

(4.) The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the county court judge, or the arbitrator appointed by him, shall, for the purpose of an arbitration under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the claim for compensation had been made by plaint in the county court.

60 & 61 Vict.
c. 37.
52 & 53 Vict.
c. 49.

(5.) Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

(6.) The costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator. The costs, whether before an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules.

(7.) In the case of the death or refusal or inability to act of an arbitrator, a judge of the High Court at chambers may, on the application of any party, appoint a new arbitrator.

(8.) Where the amount of compensation under this Act shall have been ascertained, or any weekly payment varied, or any other matter decided, under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the said committee or arbitrator, or by any party interested, to the registrar of the county court for the district in which any person entitled to such compensation resides, who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the said memorandum shall for all purposes be enforceable as a county court judgment. Provided that the county court judge may at any time rectify such register.

(9.) Where any matter under this Act is to be done in a county court, or by, to or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to or before the judge or registrar of, the county court of the district in which all the parties concerned reside, or if they reside in different

60 & 61 VICT.
c. 37. districts the district in which the accident out of which the said matter arose occurred, without prejudice to any transfer in manner provided by rules of court.

(10.) The duty of a county court judge under this Act, or of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorizes rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of the county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

51 & 52 Vict.
c. 43.

(11.) No court fee shall be payable by any party in respect of any proceeding under this Act in the county court prior to the award.

(12.) Any sum awarded as compensation shall be paid on the receipt of the person to whom it is payable under any agreement or award, and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from, the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge, on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

(13.) The Secretary of State may appoint legally qualified medical practitioners for the purpose of this Act, and any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, appoint any such practitioner to report on any matter which seems material to any question arising in the arbitration; and the expense of any such medical practitioner shall, subject to Treasury regulations, be paid out of moneys to be provided by Parliament.

(14.) In the application of this schedule to Scotland—

(a) "Sheriff" shall be substituted for "county court judge," "sheriff court" for "county court," "action" for "plaint," "sheriff clerk" for "registrar of the county court," and "act of sederunt" for "rules of court":

(b) Any award or agreement as to compensation under this Act may be competently recorded for execution in the books of council and session or sheriff court books, and shall be enforceable in like manner as a recorded decree arbitral: 60 & 61 VICT.
c. 37.

(c) Any application to the sheriff as arbitrator shall be heard, tried and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts, (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced. 39 & 40 Vict.
c. 70.

(15.) Paragraphs four and seven of this schedule shall not apply to Scotland.

(16.) In the application of this schedule to Ireland the expression "county court judge" shall include the recorder of any city or town.

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- 11 Geo. 2, c. 19 (distress), 260a, 656.
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(*a*) In some instances where the statutes on a point are numerous, they are not referred to in this work; but the reader will find them on turning to the text books cited.

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